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I. INTRODUCTION

Coercion—the constraint of a voluntary moral agent by the application of superior force, or by authority resting on force—was long identified by the prevailing jurisprudential theories as the fundamental element of all legal systems. A "noncoercive law," or so it was argued, had the same ontological status as the unicorn.[1]

Kelsen's view of the relationship between substantive law and the exercise of official force captures the essence of that positivist tradition:

> One shall not steal; if somebody steals, he shall be punished. If it is assumed that the first norm which forbids theft is valid only if the second norm attaches a sanction to the theft, then the first norm is certainly superfluous in an exact exposition of the law. If at all existent, the first norm is contained in the second norm which is the only genuine norm . . . . Law is the primary norm which stipulates the sanc-

1. *See, e.g.*, J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); T. HOBBES, THE ELEMENTS OF LAW, NATURAL AND POLITIC (2d ed. F. Tönnies 1969); T. HOBBES, LEVIATHAN (A. Walter trans. 1904); H. KELSEN, GENERAL THEORY OF LAW AND STATE (A. Wedberg trans. 1945); H. KELSEN, PURE THEORY OF LAW (M. Knight trans. 1967).

tion.[2]

Although the positivist conception of a legal system as nothing more than a set of rules backed by threats of force has been substantially discredited as inadequate,[3] it did possess an ineluctable element of truth, manifested most clearly in the body of substantive criminal law and authorized penalties. The coercive nature of the criminal sanction finds expression in the traditionally enunciated goals of punishment: deterrence, incapacitation, and reform. Imposition of suffering furthers the ends of the substantive law by physically restraining those otherwise willing to violate prescribed norms, by offering a rational incentive to those same individuals, when otherwise physically free to do so, to refrain from such violations, and by altering the individual's psychological make-up to eliminate or reduce the tendency to crime.

The validity of these goals of punishment has been, and continues to be, widely discussed in the legal, sociological, and philosophical literature. Despite the existence of significant disputes, a general consensus has emerged that one or more such ends, variously weighted, are appropriately considered in determining the disposition of a criminal case.[4] Coercive uses of the criminal sanction for purposes other than deterrence, incapacitation, and reform, however, have gone largely unexamined.

This Article will examine the exercise of the sentencing power to induce criminal defendants to cooperate with the state in ways not necessarily involving personal compliance with legal prohibitions of conduct. Such cooperation takes four broad forms: defendants fearing severity or hoping for leniency may (1) plead guilty to criminal charges, forgoing trial and waiving numerous trial-related constitutional rights; (2) testify in the criminal prosecutions of others; (3) provide extrajudicial information to government agents investigating past or potential crimes; or (4) become undercover informants or operatives

2. H. KELSEN, GENERAL THEORY OF LAW AND STATE 61 (A. Wedberg trans. 1945).

3. *See, e.g.*, L. FULLER, THE LAW IN QUEST OF ITSELF (1940); L. FULLER, THE MORALITY OF LAW (rev. ed. 1969); H. HART, THE CONCEPT OF LAW (1961).

4. *See, e.g.*, JUSTICE AND PUNISHMENT (J. Cederblom & W. Blizek eds. 1977); J. KLEINIG, PUNISHMENT AND DESERT (1973); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976) [hereinafter cited as FAIR AND CERTAIN PUNISHMENT]; A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

for law enforcement agencies. The legal, ethical, and practical difficulties inherent in the exercise of the sentencing power to achieve such ends are illustrated in an examination of what is almost undoubtedly the best-known instance of the practice—Judge John Sirica's sentencing of the Watergate burglars.

On January 30, 1973, G. Gordon Liddy and James W. McCord, Jr., were convicted by a federal court jury on charges relating to the Watergate break-in.[5] Despite the prosecution's success, Judge Sirica believed that pertinent facts concerning the break-in at the Democratic National Headquarters had remained undisclosed at trial.[6] In an effort designed to bring those facts to light, he postponed final sentencing pending completion of presentencing reports and encouraged the convicted burglars to cooperate in the interim with the ongoing Watergate investigation.

McCord's response to Judge Sirica's tactics reveals both the effectiveness of coercive sentencing and some of its troubling implications. McCord wrote to Sirica:

> Certain questions have been posed to me from your honor through the probation officer, dealing with details of the case, motivations, intent and mitigating circumstances.
>
> In endeavoring to respond to these questions, I am whipsawed in a variety of legalities. First, I may be called before a Senate Committee investigating this matter. Secondly, I may be involved in a civil suit; and thirdly, there may be a new trial at some future date. Fourthly, the probation officer may be called before the Senate Committee to present testimony regarding what may otherwise be a privileged communication between defendant and Judge, as I understand it; if I answered certain questions to the probation officer, it is possible such answers could become a matter of record in the Senate and therefore available for use in the other proceedings just described. My answers would, it would seem to me, to [*sic*] violate my Fifth Amendment rights, and possibly my Sixth Amendment right to counsel and possibly other rights.
>
> On the other hand, to fail to answer your questions may appear to be non-cooperation, and I can therefore expect a much more severe sentence.
>
> There are further considerations which are not to be lightly taken. Several members of my family have expressed fear for my life if I disclose knowledge of the facts in this matter, either publicly or to any government representative. Whereas I do not share their concerns to the same degree, nevertheless, I do believe that retaliatory measures will be taken against me, my family, and my friends should I disclose such facts. Such retaliation could destroy careers, incomes, and reputations of persons who are innocent of any guilt whatever.[7]

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5. *See* J. SIRICA, TO SET THE RECORD STRAIGHT 84-90 (1979).

6. *See id.* at 88.

7. United States v. Liddy, 397 F. Supp. 947, 951 app. (D.D.C. 1975) (quoting Letter from James W. McCord to Judge Sirica (Mar. 19, 1973)).

Despite such fears, McCord made allegations and offered to provide *in camera* information that played a substantial part in producing the dramatic results of the Watergate investigation.[8]

Having cooperated, McCord was sentenced to one to five years in prison, a sentence that was subsequently reduced.[9] In contrast, G. Gordon Liddy, who had refused to cooperate in the investigation, was given a sentence of six years and eight months to twenty years, and fined $40,000.[10] Judge Sirica emphasized the coercive purpose of these sentences when he denied Liddy's motion for a reduction of sentence:

> Subsequent to his conviction and sentencing in this case, the defendant had several opportunities to provide valuable assistance to governmental investigating units by testifying as to his knowledge of certain alleged illegal activities. He was even granted immunity from prosecution for the testimony which he was subpoenaed to give. Yet, he refused to cooperate. It is reasonable for the Court to assume that this defendant had reason to know and believe that any further consideration he might receive from the Court concerning his sentence might be affected by his conduct after sentencing. In fact he was present in the courtroom when his co-defendants were specifically informed that their cooperation with the grand jury and Senate Select Committee would be a relevant factor which the Court would consider in determining their final sentences.
>
> . . . .
>
> Yet, despite this admonition by the Court and the fact that the Court subsequently gave consideration to other defendants on this basis, this defendant chose to continue to refuse to cooperate with the government investigations.
>
> In short, this defendant has not shown the Court the slightest remorse or regret for his actions, and has not given the Court even a hint of contrition or sorrow, nor has he made any attempt to compensate for his illegal actions by trying to aid our system of justice in its search for the truth.[11]

Other judges, engaging in similar practices in less publicized cases, have expressed deeper concern for the propriety of their actions. In a case involving charges of conspiracy and civil rights violations against officers of New York City's special antinarcotics unit, United States District Judge Jack B. Weinstein, after discussing the coercive sentencing scheme he had

8. *See* J. SIRICA, *supra* note 5, at 96.
9. *Id.* at 120.
10. *Id.* at 118.
11. United States v. Liddy, 397 F. Supp. 947, 948-49 (D.D.C. 1975).
12. Under the scheme, those defendants who cooperated received favored treatment. Several officers who admitted guilt retired with pensions and were not prosecuted. At least one officer who admitted guilt was permitted to remain in the police department. Several officers who were indicted and subsequently pleaded guilty to reduced charges received relatively light sentences. The officers who were convicted after trial received substantial sentences. Those officers who cooperated after conviction received reduced sentences.

devised,[12] candidly admitted his discomfort with the role in which it placed him:

> The net result of this pattern of sentencing is and has been to make the Court in effect a party to the Government's attempt to obtain testimony to further uncover crimes and obtain convictions of criminals who constituted a serious threat to society.
>
> I have substantial doubt, and I am uncomfortable with the seamy position that this puts the courts in. . . . [W]hether other judges take the same position, I don't know.
>
> There is a considerable amount of disagreement among the federal members of the judiciary about these matters and other judges have expressed different views.
>
> . . . .
>
> My view is, however, it's proper for the judge to take all these matters in account and in effect to cooperate with the Government's attempt to obtain information and testimony.
>
> The sentencing pattern is used by the courts for a purpose which is not generally stated in any of the literature or in any of the standards. It's not used for rehabilitation. It's not used for incapacitation or used for specific or general deterrence.
>
> It is used coercively in order to obtain information. It can be argued that this is a misuse of sentencing power. If it is such a misuse, I would like to be so instructed by the appellate courts, because I say I find the whole situation rather uncomfortable.
>
> . . . [T]his whole situation is extremely dangerous because abuses by the U.S. Attorney and others are possible, because jurors who hear of this hold the law in disdain and because the judges, rather than having a position of impartiality, standing above this entire system, in effect are made part of the system.[13]

Judge Weinstein's doubts present deeply troubling questions. Does a judge step outside of his appropriate role in our adversary system when he uses his awesome sentencing powers to aid prosecutors and law enforcement officials? What are the currently developed and accepted bounds of his power to do so? From an acceptable moral perspective on the justification for punishment, what are the ethical limits, if any, on the use of differential sentencing to induce cooperation? What procedural safeguards are required to adequately protect the legal and moral rights of defendants whose cooperation is sought? Finally, what are the practical barriers to judicial implementation of a coherent theoretical approach to these problems?

This Article will address these questions. It begins with a description of the variety of coercive sentencing practices and then explicates and defends a normative scheme for evaluating these procedures, deriving certain moral limitations. The Arti-

See United States v. Codelia, No. 74-CR-729 (E.D.N.Y. Sept. 24, 1976) (motion for reduction of sentence and stay of execution).

13. *Id.*

cle then examines the relationship between such ethical constraints and the constitutional implications of coercive sentencing, and delineates a series of procedural safeguards for ensuring the effective protection of defendants' substantive rights.

II. COERCIVE SENTENCING PRACTICES

A. DIFFERENTIAL SENTENCING AND PLEA BARGAINING

Although a guilty plea may occasionally be the unilateral product of the defendant's genuine remorse, his blind faith in the compassion of an otherwise stern court, or his ignorance of the advantages to be gained by manipulating the system, it is infinitely more likely to result from a bargaining process in which the guilty plea is tendered in return for inducements proferred—explicitly or implicitly—by judges, prosecutors, or both.[14]

The usual terms of the bargain are fairly straightforward. The defendant waives a jury trial and consents to a judgment of conviction against him.[15] Somewhat more rarely, the defendant waives the right to a jury trial and consents to trial by the court. In return for a waiver, the defendant may receive one or a combination of the following benefits: (1) acceptance of a "lesser plea" in satisfaction of other pending charges; (2) agreement not to seek further charges; (3) the prosecutor's recommendation of a particular sentence or, at least, his promise to refrain from opposing defendant's request in this matter; and (4) leniency toward others.[16]

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14. The President's Commission on Law Enforcement and Administration of Justice reported that 90% of all defendants plead guilty. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967) [hereinafter cited as TASK FORCE REPORT]. In New York City, in 1974, 80% of all defendants who were initially charged with felonies ultimately pleaded guilty to misdemeanors after negotiations, and only 2% of all felony arrests resulted in trial. *See* Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 93 (1976).

15. In addition to the right to a jury trial, the defendant waives the right to confront and cross-examine witnesses against him, the right not to be compelled to incriminate himself, the right to compulsory process to call witnesses, the right to be represented by an attorney at every stage of the proceedings against him, and, if necessary, the right to have an attorney appointed to represent him. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969); FED. R. CRIM. P. 11.

16. *See generally* ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.1, at 72-74 (1968); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary on § 350.3, at 609-17 (1975); A. BLUMBERG, CRIMINAL JUSTICE (1967); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM.

1. *Acceptance of a Lesser Plea*

Upon agreeing to waive a jury trial, the defendant may be permitted to plead guilty to a lesser charge than the most serious brought by indictment. Through such an agreement, the defendant affects the limits of the sentencing judge's discretion. The offense to which the defendant pleads guilty may expose him to a lower maximum penalty, may have a lower legislatively mandated minimum sentence, or may lack any legislative provision precluding probation.[17]

2. *Agreement Not to Prosecute*

Closely related to the plea to a lesser charge is the defendant's surrender of rights with respect to one or more charges in satisfaction of all other charges that have already been brought or that could be brought. By pleading guilty to only some of the potential charges, the defendant avoids the possibility of conviction on additional counts that would expose him to consecutive sentences and increased total incarceration.[18]

L. REV. 1059 (1976); Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROB. 102 (1977).

17. Reduction of the charge may produce benefits independent of the effect on the potential sentence. For example, indirect repercussions may flow from conviction for certain crimes, such as the social stigma associated with offenses involving aberrant sexual behavior. A guilty plea to a charge not involving such conduct may avoid such consequences.

18. Such arrangements do not, as some defendants assume, eliminate any possible effect of the additional unprosecuted offenses on the ultimate disposition of the case. Within the sentencing limits legislatively mandated for the crime to which a plea is accepted, the court may lawfully consider the uncharged crimes (as well as other factors in the defendant's background). *See* United States v. Tucker, 404 U.S. 443 (1972); Williams v. New York, 337 U.S. 241 (1949); United States v. Doyle, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965). Congress recently reaffirmed this fundamental sentencing principle: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3577 (1976). Other apparent benefits may be similarly illusory. For example, judges rarely, if ever, impose the maximum sentence permissible for the most serious crime with which the defendant might have been charged. Similarly, the minimum some judges would impose on the lower charge may be higher than the legislatively required minimum for the higher charge. Finally, it may be that courts do not, as a general matter, sentence consecutively for multiple counts of the "same crime." *See* ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 3.4(b), at 23 (1968) ("Consecutive sentences are rarely appropriate. Authority to impose a consecutive sentence should be circumscribed by . . . statutory limitations.").

3. *Sentencing Recommendations*

Although a prosecutor's dismissal of some charges and acceptance of a plea to a lesser charge may reduce to some extent the trial judge's sentencing discretion, the court's discretion nonetheless remains quite broad under most modern statutes.[19] For this reason, a defendant may seek to induce the prosecutor to recommend a disposition more favorable to the defendant than might otherwise result. The terms of the plea bargain may simply require that the prosecutor refrain from recommending anything to the court and not oppose the defendant's suggested disposition. Most often, however, the defendant bargains for the prosecutor's affirmative recommendation of a specific sentence, or at least a specific maximum. Although such a recommendation is not formally binding on the court, it is usually incorporated in the final disposition.[20]

4. *Leniency Toward Others*

Although the usual plea bargain involves an advantage promised directly to the defendant, occasionally the defendant's waiver is offered in return for some form of leniency toward another person, often a family member implicated in the same or similar crimes.[21] For example, an individual might

19. Furthermore, it is virtually hornbook law that any penalty imposed within statutory limits will be undisturbed on appeal. *See* Dorszynski v. United States, 418 U.S. 424, 431 (1974) ("once it is determined that a sentence is within the limitations set forth in the statute . . . , appellate review is at an end"). *See generally* ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 1-6 (Supp. 1968); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5-49 (1973); Note, *Appellate Review of Sentences and the Need for a Reviewable Record*, 1973 DUKE L.J. 1357. *See also* United States v. Bridgeman, 523 F.2d 1099, 1121 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976); United States v. Cowles, 503 F.2d 67 (2d Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); United States v. Moore, 454 F.2d 286 (6th Cir.), *cert. denied*, 406 U.S. 946 (1972).

In addition, sentences imposed in a proper manner within the statutory maximum are generally not subject to collateral attack. *See* United States v. Mejias, 552 F.2d 435, 447 (2d Cir. 1977); United States v. Seijo, 537 F.2d 694, 700 (2d Cir. 1976), *cert. denied*, 429 U.S. 1043 (1977); United States v. Malcolm, 432 F.2d 809, 814 (2d Cir. 1970). *But see* Kortness v. United States, 514 F.2d 167, 170 (8th Cir. 1975).

20. *See* Alschuler, *supra* note 16, at 1061-99.

21. The relatively scarce case law supports the practice. *See* Crow v. United States, 397 F.2d 284 (10th Cir. 1968); Cortez v. United States, 337 F.2d 699 (9th Cir. 1964); Kent v. United States, 272 F.2d 795 (1st Cir. 1959); Thomas v. Warden, 236 F. Supp. 499 (D. Md. 1964). *See also* Note, *The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas*, 1970 WASH. U. L.Q. 289, 309 (1970).

In reliance on this case law, the Council of the American Law Institute eliminated a proposed provision of the Model Code of Pre-Arraignment Proce-

plead guilty to charges of income tax evasion in return for dismissal of similar charges against the defendant's spouse.

Although the motivating force behind most defendants' guilty pleas is an attempt to affect the severity of the sentence to be imposed, the role in the bargaining process of the trial judge, upon whom ultimate responsibility for that decision uniformly devolves, varies greatly among jurisdictions.[22] But however large or small the judge's role in the negotiations leading to the plea, it is clear that all systems of plea bargaining rely on sentencing differentials—that is, coercive sentencing—to attain their goals. Whether the ultimate differential is the product of charge reductions initiated by prosecutors and ratified by courts, unilateral prosecutorial decisions to refrain from bringing charges, prosecutorial sentencing recommendations routinely ratified by courts, or the court's own practice of sentencing more severely those who exercise their right to trial, it is the fear of penalty or the hope of leniency that is, in the end, the chief moving force behind our system of criminal justice by guilty plea.

B. Coerced Testimony and Undercover Work

A plea-bargaining defendant usually gains sentencing concessions solely in return for his waiver of a jury trial and related rights. Frequently, however, the prosecutor or court demands more, and requires that the defendant testify against others at trial or before a grand jury,[23] supply information in extrajudicial contexts to law enforcement personnel,[24] or accept the role of active undercover informant, stool pigeon, or agent provocateur.[25]

"Courts have countenanced the use of informers from time immemorial."[26] In medieval England, an accused felon could confess and inform on others. If those named were ultimately convicted, he was released; if they were acquitted, he was

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dure that would have prohibited offering lenient treatment to a person other than the defendant as an inducement for a guilty plea. *See* ALI Model Code of Pre-Arraignment Procedure, Commentary on § 350.3, at 615-16 (1975).

22. *See* Alschuler, *supra* note 16, at 1061-99.

23. *See, e.g.*, D. Newman, *supra* note 16, at 186-87.

24. *See, e.g.*, R. Dawson, Sentencing: The Decision as to Type, Length, and Conditions of Sentence 177-79 (1969).

25. *See id.* at 183-84; Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 Yale L.J. 1091 (1951).

26. United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950) (L. Hand, J.).

hanged.[27] Although there is little available empirical data on the current use of informers, it is generally conceded that the practice is widespread,[28] particularly in narcotics enforcement[29] and control of organized crime.[30]

Although many law enforcement agencies rely in part on monetary rewards for information on law violations, the most persuasive inducement for individuals to assume informant duties is lenient treatment of their own criminality.[31] Informers usually receive the kinds of leniency that are given in return for a "simple" guilty plea. The informant is either not charged with a crime committed, charged with a less serious crime, or given a lesser prison sentence than would otherwise have been imposed. In some cases, the defendant will be given probation despite the trial judge's view that there is such a substantial risk of recidivism that incarceration would normally be required.[32]

As in simple plea bargaining, it is the fact of differential sentencing—the hope of leniency or fear of enhanced punishment—that induces cooperation.

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27. *See* A. STEPHEN, CRIMINAL PROCEDURE FROM THE THIRTEENTH TO THE EIGHTEENTH CENTURY 485 (1908).

28. *See* R. DAWSON, *supra* note 24, at 96; M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT 14 (2d ed. 1968); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 133 (1965); Misner & Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713, 714-15 (1977). Legal protection against being informed on is rigidly circumscribed. *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 302 (1966) ("Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.").

29. Undercover informers carry out an estimated 90% of police-"encouraged" drug sales. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 252 (1967).

30. *See* M. HARNEY & J. CROSS, *supra* note 28, at 23-30; D. NEWMAN, *supra* note 16, at 194.

31. *See* R. DAWSON, *supra* note 24, at 96.

32. *See id.* In addition, enforcement services by prison inmates may be rewarded with parole concessions. Dawson offers the illustration of an inmate of a correctional institution who would not have been paroled on the basis of rehabilitation:

> The inmate had been convicted of assault with intent to rob, for which he was placed on probation. After one year of supervision, he violated probation and received a prison sentence of one to ten years. This was his initial parole hearing. The sentencing judge and the prosecuting attorney both recommended a parole denial. He had a prior record of assault. His I.Q. was recorded as 63. Shortly before his hearing, the inmate had learned of an escape plot involving four inmates who were hiding in a tunnel. He tipped off a guard and the inmates were apprehended. The board decided to grant parole.

Id. at 287.

C. MAGNITUDE OF SENTENCING DIFFERENTIALS

While the existence of even slight sentencing differentials conditioned on the waiver of rights or other forced cooperation might suggest potentially troubling legal and moral objections, the actual incremental differences are great and thus raise fundamental questions of justification. Data compiled by the Administrative Office of the United States Courts shows a massive and disturbing disparity between the average sentence weight for federal defendants who pleaded guilty at arraignment and those convicted of the same offenses following a jury trial.[33]

Although no similar empirical studies exist on the disparity

33. For all reported offense classes, the average sentence weight was 4.7 for those defendants who pleaded guilty at arraignment, while it was 13.5 for those convicted by a jury. For marijuana offenses, the average sentence weight for defendants who pleaded guilty was 5.3, while it was 16.4 for those convicted by a jury. The contrast was 1.8 versus 7.0 for violations of federal regulatory statutes, 1.6 versus 7.0 for immigration law violations, and 9.2 versus 26.8 for narcotics offenses. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS, Table 16, at 55 (1971).

In order to facilitate the grouping of data, the Administrative Office uses a conversion scheme, transforming actual sentences into average sentence weights. *See id.* at 29. The use of average sentence weights for purposes of comparison actually understates the true disparities. If average sentence weights are transformed into months of sentence actually imposed, it appears that the average sentence length for all reported offenses ranged between 6.1 and 11.1 months for those defendants who pleaded guilty, while it ranged between 46.0 and 57.0 months for those convicted after exercising their right to a jury trial. This means that for all offenses reported, defendants convicted by a jury received sentences between 5.14 and 7.54 times as long as defendants who pleaded guilty at arraignment. These sentences were between 39.9 months and 45.9 months longer on the average.

The extreme disproportions between sentence lengths for defendants convicted after exercising the right to a jury trial and sentence lengths for those who pleaded guilty at arraignment are consistently evident and consistently overwhelming.

A correlational study of factors related to sentencing, reported by the U.S. Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, provides an additional perspective on the relationship between average sentence weights and process variables such as pleading guilty at arraignment or standing trial. For narcotics offenses, more of the variance in average sentence weight was accounted for by the variables "plea of guilty at arraignment" and "conviction at trial" than any other variables, including previous criminal record and age of defendant. L. SUTTON, FEDERAL SENTENCING PATTERNS: A STUDY OF GEOGRAPHICAL VARIATIONS 17-19 (1978). For auto thefts, method of conviction was second only to previous criminal record in determining the severity of the sentence received. *Id.* at 17.

Because of the post hoc nature of this analysis, it cannot be demonstrated conclusively that the reported disparities in sentence were *caused* by the exercise of the right to trial. It is possible that the exercise of trial rights is correlated with some other variable which in fact causes increased severity in sentence. Nevertheless, while it is impossible to rule out all *conceivable* alternative explanations, analysis of the studies fails to support variables such as

in sentencing based on cooperation other than by guilty plea, two points are worth noting. First, to the extent that a prosecutor's willingness to offer or accept a plea bargain depends on the defendant's willingness to aid in other prosecutions, figures on plea bargaining incorporate sentencing differentials imposed for other coercive purposes. Second, the facts of the relatively few reported cases dealing with sentences imposed for failure to cooperate suggest that the degree of sentence disparity is roughly as great as in the context of pure plea bargaining.[34]

Whether the data relied on is the product of formal empirical research or is more anecdotal and impressionistic, the enormity of established sentencing differentials for coercive purposes raises serious ethical questions concerning the proper exercise of judicial sentencing discretion, and requires a serious study of the values served and the permissibility of the means employed.

III. ETHICAL JUSTIFICATIONS FOR COERCION

The principles that govern the sentencing decision, and the purposes it is to serve, should not be ad hoc rules created for the limited purpose of guiding trial courts in disposing of criminal cases. Sentencing is an act of profoundly moral dimensions and must be guided by rules derived from the same moral principles that we are prepared to defend as guides in all situations of ethical choice, whether within or without the legal system. Absent such explicitly formulated and followed norms, a system of lawful punishment degenerates into the chaotic and lawless imposition of rationally indefensible suffering.

There are, of course, judges, lawyers, and academics who question the desirability of engaging in philosophical speculation in situations concerning the actual imposition of severe punishments upon real-life defendants by real-life courts. They accept without qualification H.L.A. Hart's observation:

> No one expects judges or statesmen occupied in the business of sending people to the gallows or prison, or in making (or unmaking)

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sex, race, age, or prior record as explanations of the effect associated with failing to plead guilty.

34. *See, e.g.*, DiGiovanni v. United States, 596 F.2d 74, 75 (2d Cir. 1979) (vacating sentence of five years' imprisonment plus three years' special parole term, a sentence imposed, in part, as additional punishment for defendant's "reluctance . . . to assist the government"); United States v. Ramos, 572 F.2d 360, 362 (2d Cir. 1978) (vacating sentence of ten years' imprisonment plus ten years' special parole term for "mule" in narcotics transaction on the ground that sentence might have resulted from defendant's refusal to testify in another case).

> laws which enable this to be done, to have much time for philosophical discussion of the principles which make it morally tolerable to do these things. A judicial bench is not and should not be a professorial chair.[35]

As a matter purely of human psychology, it is understandable that judges faced with the terrible reality that the imposition of a prison sentence may result in the defendant's physical and mental brutalization, sexual abuse, and permanent injury or death, might question the value of debates between Kantians and Benthamites, intuitionists and positivists. Such questioning implies that the outcome of these debates is irrelevant to the ultimate guidance of judicial conduct; that while the determination to place an individual on probation rather than to incarcerate him has enormous personal ramifications for the defendant, the court's adoption of a retributivist rather than a utilitarian perspective on punishment does not. That implication, however, is wrong. The decision to incarcerate and the sentence imposed may largely depend upon the normative standards that are adopted to justify punishment.[36]

Each such ethical standard, when applied to the facts of an individual case, establishes what may be called a "maximum appropriate sentence"—that is, an upper limit beyond which punishment, though authorized by positive law, is morally indefensible. This concept of a maximum appropriate sentence is a critical element of any coherent sentencing scheme, and plays an indispensable role in analyzing the permissible scope of coercive punishment. As the following sections demonstrate, however, the two systems most often appealed to in ethical judgments employ significantly different definitions of the maximum appropriate penalty, and in practice may justify incompatible sentencing practices. Critical evaluation of both systems suggests that neither alone is ultimately justifiable, but that a synthesis of the two is possible and defensible. That synthesis is then provided, and a set of moral principles to which rational individuals would turn to decide any moral dispute is explicated and defended. The implications of that theory for sentencing practices are derived, and a system for evaluating the permissible nature and scope of coercive sentencing is described.

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35. H. HART, PUNISHMENT AND RESPONSIBILITY 2 (1968).

36. The current debate over the desirability of determinate sentencing furnishes just one illustration of the manner in which the philosophical perspective adopted may affect the form and substance of the practice of courts and legislatures. *See, e.g.*, N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); FAIR AND CERTAIN PUNISHMENT, *supra* note 4; A. VON HIRSCH, *supra* note 4.

A. UTILITARIANISM

Until recently, an examination of the literature on criminal sentencing would have established near-unanimity about the objectives that justify punishment: incapacitation, rehabilitation, specific deterrence, and general deterrence. The enumeration of these specific justifications for punishment represents an implicit, and often explicit, adoption of a utilitarian moral theory. It is therefore appropriate to begin with consideration of that normative system.

Utilitarianism is grounded on one basic tenet: It is right for an agent to perform an act, *X*, if, but only if, of all the possible alternative actions open to the agent, *X* will, actually or probably, produce the consequences having the maximum amount of intrinsic value.[37] Formulated less rigorously, utilitarians are moral teleologists or consequentialists; they assert that the rightness or wrongness of an act is a function of the act's efficacy in producing good consequences. Under the utilitarian approach, the actor must, in any situation of moral choice, consider the total consequences of each alternative possible course of action and choose that action with the greatest overall balance of good results over bad. The "rightness" of actions is thus determined by the "goodness" of ends.[38]

The standard traditionally used to evaluate the relative goodness of ends has been the happiness, pleasure, or well-being of each individual affected by the act.[39] Only pain and pleasure, and happiness and unhappiness, are viewed as bad or good in themselves; all other things and actions are instrumentally good—that is, good as means to desirable ends. Reduced

37. *See generally* M. BAYLES, CONTEMPORARY UTILITARIANISM (1968); D. HODGSON, CONSEQUENCES OF UTILITARIANISM (1967); D. LYONS, FORMS AND LIMITS OF UTILITARIANISM (1965).

38. Of the intrinsic value or goodness of ends, G.E. Moore wrote:

> By calling one effect or set of effects *intrinsically better* than another it means that it is better *in itself*, quite apart from any accompaniments or further effects which it may have. That is to say: To assert of any one thing, A, that it is *intrinsically* better than another, B, is to assert that if A existed *quite alone*, without any accompaniments or effects whatever—if, in short, A constituted the whole Universe, it would be better that such a Universe should exist, than that a Universe which consisted solely of B should exist instead.

G. MOORE, ETHICS 37 (1947). *See also* Baylis, *Grading, Values and Choice*, 67 MIND 485, 490 (1958).

39. Mill wrote that " 'utility' or the 'greatest happiness principle' holds that actions are right as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure." J.S. MILL, UTILITARIANISM 10 (1957).

to its simplest terms, utilitarianism holds that an act is morally acceptable if it maximizes overall social well-being, measured in terms of people's happiness, and affords no independent moral weight to any principle that limits the maximization of such happiness.

The specific implications of this general theory for criminal law and punishment were clearly drawn by Jeremy Bentham:

> The business of government is to promote the happiness of the society, by punishing and rewarding. . . . In proportion as an act tends to disturb that happiness, in proportion as the tendency of it is pernicious, will be the demand it creates for punishment. . . .
>
> . . . .
>
> . . . But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.[40]

In general utilitarian terms, then, the criminal law accomplishes its aim by excluding those types of conduct with consequences that detract from the general intrinsic good. Punishing lawbreakers by imprisonment or fines, however, also inflicts suffering and is therefore a prima facie evil that can be justified only if it prevents still greater evil from occurring, and if the total utility of the system is greater than the total utility of any other possible system that also serves to gain conformity to law.[41] From this perspective, the maximum appropriate penalty is that which, on a total "cost-benefit" analysis, maximizes societal happiness. Therefore, in order to show that any form of coercive sentencing is justifiable on utilitarian grounds, it is necessary to demonstrate both that such sentencing can have good consequences, and that the total value of those consequences is greater than the harm inflicted on defendants and society.

It is at least prima facie plausible to claim that coercive sentencing is justified on grounds of utility. The rapid processing of cases through the criminal justice system by plea bargaining results in speedier trials for those who plead not guilty and frees scarce monetary resources for use in socially beneficial programs.[42] The supplying of information and testimony by defendants and their use as active informants serves to detect and prevent crime.[43] Arguably, the total good of these ben-

40. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 70, 170 (L. LaFleur ed. 1948).

41. *See* R.B. BRANDT, ETHICAL THEORY 490 (1959).

42. *See* notes 175-178 *infra* and accompanying text.

43. *See* notes 23-32 *supra* and accompanying text.

efits is greater than the suffering imposed on those defendants who are encouraged to cooperate. Coercive sentencing may, then, satisfy the utilitarian principle. Unless, however, it can further be shown that utilitarianism itself furnishes an acceptable philosophical perspective on punishment generally, it cannot be concluded that any form of coercive punishment is justifiable, *simpliciter*.

Unless we are prepared to abandon a fundamental and common-sense moral belief, utilitarianism must be rejected as the ultimate standard by reference to which such matters are to be decided. It must be rejected because it fails to account for the duty to requite desert—to give individuals that which they deserve. As John Stuart Mill acknowledged,

> it is universally considered just that each person should obtain that (whether good or evil) which he *deserves*; and unjust that he should obtain a good, or be made to undergo an evil, which he does not deserve. This is, perhaps, the clearest and most emphatic form in which the idea of justice is conceived by the general mind.[44]

One need search neither long nor hard in the philosophical literature, though, to find numerous hypothetical cases demonstrating that an action which serves to maximize utility fails to requite desert and is therefore unjust and morally wrong. Critics of the utilitarian approach provide examples of imposed sanctions which, although undeserved, may nevertheless serve to minimize future harm. Typically, these examples focus on instances of "illegal" punishment of the morally innocent.[45]

Instances of undeserved sanctions are not, however, limited to "illegal" punishment of morally blameless individuals. An illustration of this is furnished by the recent radical revision of views on the rehabilitative model of sentencing.[46] In part, the massive professional and academic disillusionment with the therapeutic model stems from the simple practical inability of the criminal justice system to reform serious offend-

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44. J.S. MILL, UTILITARIANISM 41 (1910).

45. [T]he utilitarian must hold that we are justified in inflicting pain always and only in order to prevent worse pain or bring about greater happiness. This, then, is all we need to consider in so-called punishment, which must be purely preventive. But if some kind of very cruel crime becomes common, and none of the criminals can be caught, it might be highly expedient, as an example, to hang an innocent man, if a charge against him could be so framed that he were universally thought guilty; indeed this would only fail to be an ideal instance of utilitarian "punishment" because the victim himself would not have been so likely as a real felon to commit such a crime in the future; in all other respects it would be perfectly deterrent and therefore felicific.

E. CARRITT, ETHICAL AND POLITICAL THINKING 65 (1947) (footnote omitted).

46. *See* notes 163-167 *infra* and accompanying text.

ers effectively through incarceration.[47] An additional and significant factor, however, is the jurisprudential realization that even if offenders could be rehabilitated through sufficiently protracted sentences, such disproportionate punishment is morally impermissible.[48] It is simply not viewed as justifiable to impose undeservedly severe sanctions on an individual merely to gain some increase in overall social good.[49]

Utilitarians have not ignored such criticisms of their theory. They have made serious efforts to reconcile the duty to requite desert with the keystone of utility, future harm minimization.[50] In pursuit of such a reconciliation, some have declared that the duty to requite desert and future harm minimization can never be truly at odds because they are merely different names for a single concept; a deserved punishment, properly understood, is nothing more than that punishment which will optimally reduce future suffering.[51]

Such a claim, however, ignores a fundamental aspect of the notion of desert: "desert," as contrasted with "utility," is a

47. *See* FAIR AND CERTAIN PUNISHMENT, *supra* note 4, at 83-91; A. VON HIRSCH, *supra* note 4, at 11-18.

48. The most recent in a spate of acknowledgments of this moral truth has been made by Professor Alschuler:

> That I and many other academics adhered in large part to this reformative viewpoint only a decade or so ago seems almost incredible to most of us today. To probe a person's psyche and predict his future behavior is always an awesome task, and the optimistic belief that one can discern a person's general propensity for law observance from his regimented conduct in a prison now seems remarkably naive. Although not all of us are ready simply to abandon rehabilitation as one objective of the criminal process (at least not in every circumstance), we have become far less ambitious in pursuing this goal than we were a few years ago when we encouraged our state legislatures to adopt some variation of the Model Penal Code's sentencing scheme. Our general disillusionment with rehabilitative goals stems from both jurisprudential and pragmatic considerations. Even if the state could achieve its rehabilitative objectives far more often than it does, we have become doubtful that an offender's wrongdoing justifies a broad assumption of governmental power over his personality.

Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 552 (1978).

49. This is not to say that overall social well-being *never* justifies a departure from just deserts. Given a sufficiently great social advantage to be gained, or some substantial increase in the protection of the rights of others, the rights of some individuals may be infringed. *See* notes 73-81 *infra* and accompanying text.

50. *See* Brandt, *Toward a Credible Form of Utilitarianism*, in MORALITY AND THE LANGUAGE OF CONDUCT 107 (H. Castaneda & G. Nakhmkian eds. 1963); Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3 (1955); Sprigge, *A Utilitarian Reply to Dr. McCloskey*, 8 INQUIRY 264 (1965).

51. *See* J.S. MILL, UTILITARIANISM 52-79 (1957).

past-oriented concept. To say that a person deserves a particular punishment is to claim that there is a propriety in imposing it on him. This propriety exists because of a proportion or balance, not between the harm of the penalty and the harm prevented by deterrence (a future fact), but rather between the harm of the penalty and the culpability of the offender (a past fact). Desert, as a conceptually backward-looking notion, examines the properties of the action committed, rather than the properties of the future actions deterred.

Perhaps acknowledging this, some utilitarians have offered the alternative thesis that, although conceptually distinct, desert and utility are factually coextensive—that all and only those punishments that satisfy the criteria of desert will in fact maximize future well-being.[52] This empirical claim, although backed by the full force of utilitarian *faith*, is never supported by factual data, and as an impressionistic matter, seems patently false. However unsuccessful the rehabilitative model of punishment has been as a general matter, it is reasonable to assume that there are in fact *some* individuals who, after serving disproportionately long prison sentences, emerge "reformed." If only one such case can be found, the coextensivity thesis stands refuted. In any event, the utilitarian proponents of that thesis have failed to meet their burden of coming forward with evidence in its support.

Utilitarians are left, then, to defend the thesis that "very often" those actions that minimize future harm will also requite desert. Although such a correlation may in fact exist, utilitarians can only defend their norm if they can also argue convincingly that it is morally right to follow the course of utility at the expense of the satisfaction of desert in *all* cases in which desert and future harm minimization are not coextensive.

Perhaps in certain instances it is considered morally permissible to sacrifice desert for utility. For example, in constitutional law, individual rights, even those ranked as fundamental, may be overridden when necessary to serve compelling state interests.[53] If such interests could be served by inflicting undeserved suffering, such a course might be thought justifiable. The utilitarian, however, is not committed to inflicting undeserved punishment only when the interest to be served is compelling. He is committed to any action that will increase utility

52. *See* Sprigge, *supra* note 50.
53. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).

even by the smallest conceivable amount.[54] But is this what we really believe about the duty to punish justly? Do we think such a duty may be overridden for the slightest increase in good consequences? The answer must surely be "no." We certainly are not willing to admit that in every instance in which utility can be slightly enhanced we may, in fact *must*, inflict undeserved punishment.[55] Unless we are willing to abandon the duty to requite desert as a touchstone of the validity of any proposed ethical principle, we must reject the utilitarian model as the ultimate moral standard by which to determine the justifiability of imposing sanctions.

B. RETRIBUTION

In sharp contrast to the utilitarian theory, which fails to adequately accommodate claims of moral desert, stands the retributive theory of justice, to which such claims are fundamental. The basic tenet of the retributive theory of justice is that regardless of consequences, deserved punishment is always either just or of some positive moral worth, and undeserved punishment is always either unjust or of some negative moral worth.[56]

The most famous retributive theory of punishment, that of Immanuel Kant, was derived from a general theory of duty or obligation.[57] That theory proposed a supreme law of morality, the Categorical Imperative, embodied in the "Principle of Humanity": "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a

54. *See* W. ROSS, THE RIGHT AND THE GOOD 22 (1930).

55. Moreover, when such a violation of the duty to requite desert is countenanced, it would be at the expense of an important principle:

> Given enough misery to be avoided by the sacrifice of an innocent person, there may be situations in which it might be thought morally permissible to take this step. But, again, if we took the step, we would have to face a clash between two principles. We would then sacrifice the principle of fairness designed to protect the individual from society to the principle that an overwhelming advantage to society should be secured at any cost; but a clash between two principles is different from the simple application of a single utilitarian principle that anything which benefits society is permissible.

H. HART, *supra* note 35, at 81. The utilitarian sacrifices no principle in such cases. His action satisfies the only principle which he recognizes as valid.

56. "Virtue and happiness together constitute the possession of the highest good for one person, and happiness in exact proportion to morality (as the worth of a person and his worthiness to be happy) constitutes that of a possible world." I. KANT, CRITIQUE OF PRACTICAL REASON 215 (L. Beck trans. 1949).

57. *See* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (L. Beck trans. 1959).

means only."[58] Kant expressly discussed the implications of this view for punishment:

> Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things. . . . His innate personality (that is, his right as a person) protects him against such treatment, even though he may indeed be condemned to lose his civil personality. He must first be found deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens. The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it.[59]

Desert is both a necessary and a sufficient condition for the justifiable imposition of punishment, and the amount of punishment that may be imposed is that which is proportionate, appropriate, or fair.

This concept of "desert" or "deserved penalty," so fundamental to the retributive view and to the normative scheme

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58. *Id.* at 47. It should be noted that the mere use of an individual as a means to an end is not alone prohibited by the Categorical Imperative. If such were the case, we would be prohibited from calling a doctor to treat our illness, for in such cases we use the doctor as a means to the satisfaction of our own ends. In fact, in virtually every interpersonal activity we use some person as a means to some end. Clearly, Kant did not wish to prohibit, nor does the Categorical Imperative prohibit, such activities. Rather, the Categorical Imperative condemns only those actions that use individuals solely as a means, that is, where they are not, at the same time, considered "ends in themselves."

We may treat an individual as an "end in himself" in at least two ways: negatively, by refraining from interfering with those of his actions that are in pursuit of some subjective end, such as happiness, and that are not themselves immoral; and positively, by affirmatively acting to further the satisfaction of an individual's ends. The patient who calls for a doctor to cure an illness follows both practices. He does not interfere with the doctor's pursuit of his own chosen ends, which include the practice of medicine itself and the happiness that results from the remuneration for his services. The patient, in fact, furthers those ends by requesting medical services.

59. I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (J. Ladd trans. 1965). Similarly, F.H. Bradley wrote:

> We pay the penalty, because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be. We may have regard for whatever considerations we please—our own convenience, the good of society, the benefit of the offender; we are fools, and worse, if we fail to do so. Having once the right to punish, we may modify the punishment according to the useful and the pleasant; but these are external to the matter, they can not give us a right to punish, and nothing can do that but criminal desert.

F. BRADLEY, ETHICAL STUDIES 26-27 (2d ed. 1927).

that, it will be argued, should be employed in delineating the permissible scope of coercive sentencing, bears close scrutiny. The claim that individual *A* deserves punishment *P* encompasses two claims: (1) *A* is morally blameworthy for some act or omission, and (2) punishment *P* is "equivalent" to *A*'s moral fault. The general legal and philosophical problem concerning the conditions under which a person can truly be considered blameworthy is not implicated in the area of coercive sentencing.[60] The more difficult problem is to determine when a punishment is "equivalent" to a person's blameworthiness.

Two potential solutions may be considered and rejected. The first is suggested by the *lex talionis*: "an eye for an eye." The equivalence between the crime and the punishment is realized when the offender is treated exactly as he has treated others; a killer, for example, would forfeit his own life. There are many offenses, however, for which an equivalent penalty is hard to imagine. What, for example, is to be done to a traitor, or to a forger?[61] Furthermore, the approach is workable, if at all, only for crimes intentionally committed. If I purposely take a life, perhaps the fitting penalty is for my own life to be taken. But what of the person who recklessly or negligently causes death? Is he to suffer the same penalty as the intentional murderer? Even with respect to intentional crimes, the *lex talionis* ignores elements of relative culpability now acknowledged as essential components of any sentencing scheme[62] and commits the state to impose punishment repugnant to any civilized society.

Little more convincing than the *lex talionis* is the modification that the amount, rather than the kind, of suffering inflicted on a wrongdoer must equal the suffering produced by his crime. Under such a view, could failed attempts be punished at all? Would harms negligently caused be punished equally with those recklessly or intentionally brought about?

A third possibility, that an individual's suffering by punishment must equal his culpability, approaches nearer the mark.

60. It is quite clear, in the ordinary case, that the defendant who is coerced to plead guilty or cooperate with the state is a responsible agent who has committed a crime under circumstances evincing blameworthiness.

61. "There are very many crimes that will in no shape admit of these penalties without absurdity and wickedness: theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery." BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3 (book IV), *quoted in* H. HART, PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY 6 (1962).

62. *See* Tappan, *Sentencing Under the Model Penal Code*, 23 LAW & CONTEMP. PROB. 528, 528-29 (1958).

Under this proposal, culpability for a crime is a function of both the seriousness of the harm sought to be prevented by the law defining the crime and the actor's degree of responsibility for that crime. There is, however, a fatal flaw in this proposal: "[N]o penalty can be regarded as either equivalent or not equivalent, in any factual sense, to a man's culpability in his offence. This is so because the distress of a penalty and the culpability of an offender are not commensurable. There are no common units of measurement."[63]

One apparent solution to this dilemma is the substitution of "proportionality" for "equivalence." Under this approach, offenses are ranked by the comparative degree of culpability of those who commit them, and punishments are ranked in order of severity measured by the amount of suffering imposed. A system of punishment would accord with desert if the penalty for every offense were more severe than the penalty for all offenses of less culpability.[64] Even this modification, however, is subject to telling criticism. Assuming that an accurate scale of crimes can be determined, it will be difficult, if not impossible, to quantify the corresponding punishment. "While we can know that first-degree murder should be higher than manslaughter, and that X+1 years is a weightier punishment than X years, none of this tells us what we should substitute for X if punishment is to match desert."[65] Moreover, there is the problem of avoiding nonarbitrary intervals between crimes ranked in order of severity.[66]

In light of these difficulties and of the failure of recent attempts to formulate a precise formula for proportionality in sentencing,[67] the obvious question is whether desert must be

63. T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 28 (1971).

64. *See* Mundle, *Punishment and Desert*, 4 PHILOSOPHICAL Q. 222 (1954).

65. Pincoffs, *Are Questions of Desert Decidable?*, in JUSTICE AND PUNISHMENT, *supra* note 4, at 75, 85 (1977).

66. [I]f we rank crimes in order of their seriousness we still do not know anything about the intervals between crimes on the scale. Thus, if we have crimes ranked first through hundredth in ascending order of seriousness it may still be the case that, while the 50th crime is only slightly worse than the 49th, the 51st will be *far* worse than the 50th. The consequence is that, given this possible disparity of intervals, it seems simply arbitrary to move up the punishment scale by regular intervals in determining the punishment legislatively appropriate to the 49th, 50th, and 51st crimes. But, since the scale of crimes *is* an ordinal one only, there's no way of *calculating* that the 51st crime is, say, twice as bad as the 50th and that it therefore deserves twice as much punishment.

Id. (emphasis in original).

67. *See* A. VON HIRSCH, *supra* note 4, at 132-40; C. Card, *Retributive Penal Liability*, 7 AM. PHILOSOPHICAL Q. MONOGRAPHS 17 (1973). Both works have

abandoned as a meaningful or useful concept of punishment. There are important reasons for a negative answer.

The mere fact that scholars have been unable to define with mathematical precision the criteria of proportionality essential to the concept of desert does not make either desert or proportionality a meaningless concept. It is an oft-voiced view that a particular reported sentence was disproportionately lenient or severe; listeners to such assertions may vigorously disagree with the view expressed, but they do not in any way consider it *meaningless*. So too with claims of desert. We all, in our nonphilosophical moments, recognize the moral strength and, a fortiori, the meaningfulness of claims based on the denial of a deserved good. Certainly there is a wide disparity in views regarding what sentence is proportionate or appropriate for a given criminal defendant. Such disagreement, however, is not itself sufficient to invalidate the retributive scheme. Under the alternative system of utilitarian punishment, there is *in theory* an empirically determinable ideal sentence—the one that will maximize overall societal happiness. A trial judge cannot readily determine which punishment satisfies that criterion. Is five years in a given case of armed robbery the sentence best fitted to serve the ends of deterrence, incapacitation, and reform? Is four years better suited to that goal, or six? Here, as with retributive proportionality, certain sentences are clearly too severe and others too lenient. Within these broadly defined limits, judges' beliefs concerning the useful consequences of their acts may vary widely. Such variations in belief, while resulting in a troubling lack of uniformity in sentencing, have not been thought to be sufficient to invalidate empirically grounded theories of punishment. Similarly, disagreements about proportionate penalties should not lead to abandonment of the retributive principle, unless we are also prepared to abandon the basic concept of desert that underlies much of our general notion of social justice.

In addition to their moral significance, and despite problems of verifiability, the fact that desert claims are intelligible and forceful has been acknowledged as a matter of both state and federal constitutional dimensions.[68] Although recog-

been critically analyzed by Hugo Bedau. *See* Bedau, *Concessions to Retribution in Punishment*, in JUSTICE AND PUNISHMENT, *supra* note 4, at 51, 65-67.

68. In O'Neil v. Vermont, 144 U.S. 323 (1892), a defendant convicted on multiple counts of unauthorized sale of liquor was sentenced alternatively to a fine of over $6,000 or more than 54 years at hard labor. Although a majority of the U.S. Supreme Court declined on grounds of federal-state comity to decide

nizing, with the California Supreme Court, that "[w]hether a particular punishment is disproportionate to the offense is, of course, a question of degree,"[69] and that the "choice of fitting and proper penalties is not an exact science,"[70] it seems clear that proportionality is a legally and ethically necessary element of an acceptable system of punishment.

Although recognition of desert claims is a critical element of any justifiable scheme of punishment, retribution cannot and should not be the sole end of such a system. The retributive theory of justice, as noted earlier,[71] requires not only that the guilty be punished, but also that the blameless not be punished; undeserved punishment is, according to the pure retributive scheme, an incommensurable evil. Under a system of pure retribution, any system of criminal laws and sanctions is unjustifiable, since any such system will undoubtedly punish some innocent or blameless individuals, given empirical difficulties in

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whether such a sentence violated the cruel and unusual punishment clause of the eighth amendment, Justice Field stated in dissent that the sentence was "one which, in its severity, considering the offences of which [the defendant] was convicted, may justly be termed both unusual and cruel." *Id.* at 339. While acknowledging that the eighth amendment was traditionally thought to apply to physically torturous methods of punishment, Justice Field found that the prohibition was broader in scope: "The inhibition is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive . . . ." *Id.* at 339-40.

Justice Field's dissenting view in *O'Neil* became law less than two decades later in the landmark case of Weems v. United States, 217 U.S. 349 (1910). In that case, the Supreme Court reviewed a sentence of fifteen years' imprisonment for a small embezzlement. The Court quoted the forgoing language from *O'Neil* and noted that "imprisonment in the State prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." *Id.* at 368 (quoting McDonald v. Commonwealth, 173 Mass. 322, 328, 53 N.E. 874, 875 (1899)). Examining the sentence in this light, the Court observed: "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." 217 U.S. at 366-67.

There have been similar interpretations of state constitutional requirements. *See In re* Lynch, 8 Cal. 3d 413, 424, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1972); State v. Evans, 73 Idaho 50, 57-58, 245 P.2d 788, 792 (1952); Dembrowski v. State, 251 Ind. 250, 254, 240 N.E.2d 815, 817 (1968); Workman v. Commonwealth, 429 S.W.2d 374, 377 (Ky. 1968); People v. Lorentzen, 387 Mich. 167, 176, 194 N.W.2d 827, 831 (1972); State v. Kimbrough, 212 S.C. 348, 353, 46 S.E.2d 273, 275 (1948).

69. *In re* Lynch, 8 Cal. 3d 413, 423, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1972).

70. *Id.*

71. *See* text accompanying note 56 *supra* and accompanying text.

fact-finding and human fallibility on the part of lawyers, prosecutors, jurors, and judges.

Furthermore, it is virtually impossible to inflict punishment on the guilty without also causing undeserved suffering to the offender's family and friends. If such undeserved punishment or suffering is incommensurable with societal protection from harm through a code of criminal law backed by sanctions *generally* applied only to the blameworthy, then all punishment must stop. If punishment can only be inflicted when it is certain that no innocent person will ever suffer as a result, we can never punish. Surely no proponent of the retributive theory of justice would wish to defend such a position. In order to permit the undeserved suffering of a few individuals, which is necessary to achieve a system of protective criminal law, we must move from retribution as the sole justification for criminal sanctions to a scheme that also recognizes utilitarian considerations.

C. Pluralism

Pluralism is a justifiable synthesis of utilitarianism and the retributive theory of justice. Pluralism adopts the utilitarian view that punishment is ultimately justified by its ends, but rejects the utilitarian commitment to any action that will bring the slightest increase in utility over other alternatives. Instead, in deference to the moral force of claims of desert, pluralism accepts certain limitations on the pursuit of the general good through punishment.

Pluralism recognizes the powerful element of truth expressed by each of these two principles: (1) punish individuals whenever, and only when, such punishment will increase societal well-being; and (2) punish all and only those individuals who are deserving of such treatment. Pluralism acknowledges, however, that these principles may conflict; situations may arise in which undeservedly severe punishment may serve desirable ends, or in which deservedly severe punishment may yield no gain over less drastic treatment.

It is therefore necessary to provide a second-order principle to determine which of the two first-order principles will govern in areas of conflict. Such a second-order principle must be flexible enough to permit the functioning of an actual criminal justice system despite the occasional injustices such a system will, as a practical matter, engender. On the other hand, the

principle must be sufficiently rigid to preclude the types of unfair but useful practices permitted under utilitarianism.

Formulation of such a defensible second-order principle requires consideration of the concept of a "*prima facie* duty," a fundamental element of the ethical system devised by W.D. Ross:

> I suggest "*prima facie* duty" or "conditional duty" as a brief way of referring to the characteristic (quite distinct from that of being a duty proper) which an act has, in virtue of being of a certain kind (e.g., the keeping of a promise), of being an act which would be a duty proper if it were not at the same time of another kind which is morally significant. Whether an act is a duty proper or actual duty depends on *all* the morally significant kinds it is an instance of. . . . When I am in a situation, as perhaps I always am, in which more than one of these *prima facie* duties is incumbent on me, what I have to do is to study the situation as fully as I can until I form the considered opinion (it is never more) that in the circumstances one of them is more incumbent than any other; then I am bound to think that to do this *prima facie* duty is my duty *sans phrase* in the situation.[72]

Every time, then, that an action is of a sort prohibited by a moral rule, I have a reason for *not* doing it. Every time that an action is of a sort commended by a moral rule, I have a reason *for* doing it. For example, if I am on my way to an appointment and I see an accident occur, stopping my car in order to give aid is an action of at least two morally significant types: it is the breaking of a promise (my appointment), and an act of beneficence (helping the victim of the accident). In any given circumstances, I must weigh the various duties and determine which is the strongest; this will tell me which action I have an actual duty to perform. When I do my actual duty, then, I may have to violate a prima facie duty or moral rule, but I cannot be hold morally at fault since my behavior is in accordance with a stronger prima facie duty, and it is not in my power to satisfy both rules.

What are the implications of this view of rights and duties with respect to the punishment of criminal defendants? The state's prima facie obligation to protect its citizens from violations of their rights, particularly "those without which a reasonably secure and comfortable life is impossible,"[73] justifies the imposition of sanctions on individuals, because such sanctions will have the utilitarian effect of reducing crimes. In addition to the state's duty to protect the rights of citizens from violations by other citizens, however, there is also a duty to protect the

72. W. Ross, *supra* note 54, at 19 (emphasis in original).
73. *Id.* at 59.

rights of citizens from violations by the state itself.[74] Thus the state has a dual obligation to protect its citizens from crime and not to punish blameless individuals.

Each of these duties, however, is a prima facie and not an unqualified duty. When they conflict, the weaker duty must give way to the stronger. As Ross writes,

> [If] a man has respected the rights of others, there is a strong and distinctive objection to the state's inflicting any penalty on him with a view to the good of the community or even to his own good. The interests of the society may sometimes be so deeply involved as to make it right to punish an innocent man "that the whole nation perish not." But then the *prima facie* duty of consulting the general interest has proved more obligatory than the perfectly distinct *prima facie* duty of respecting the rights of those who have respected the rights of others.[75]

The state may, then, weigh the rights of society, or of a large part of society, against the rights of the individual. When the rights of the former stand to be severely violated, the state may protect them by violating the rights of blameless individuals.[76]

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74. The state owes no such prima facie duty to an individual who has violated the rights of others:

> [The blameworthy offender], by violating the life or liberty or property of another, has lost his own right to have his life, liberty, or property respected, so that the state has no *prima facie* duty to spare him, as it has a *prima facie* duty to spare the innocent. It is morally at liberty to injure him as he has injured others, or to inflict any lesser injury on him, or to spare him, exactly as consideration both of the good of the community and of his own good requires.

Id. at 60-61.

75. *See id.* at 61.

76. D. Raphael put forth an argument that is similar to that made by Ross. Raphael urged that when "a person is guilty of having wilfully done wrong, he has thereby forfeited part of his claim to be treated as an end-in-himself; in acting as a non-moral being he leaves it open to his fellows to use him as such." D. RAPHAEL, MORAL JUDGMENT 71 (1955). A blameworthy individual may, but need not necessarily, be punished: "[W]here there is an obligation to punish, the obligation arises from utility." *Id.* at 70.

The state, furthermore, has an "obligation to the public at large to safeguard their security, and the corresponding claim is the claim of the public to have their security safeguarded." *Id.* at 71. We may punish, and, in fact, have a duty to punish, blameworthy individuals whose punishment will satisfy the claim of the public to be protected. What, though, of blameless offenders?

> Where there is no guilt, the infliction of pain on a particular person may still be socially useful, but the claim of social utility is opposed by the claim of the individual to be treated as an "end-in-himself" and not merely as a means to the ends of society. . . .
>
> [However, the public still has its claim to be safeguarded and this] obligation to, or claim of, the public at large, exists of course at all times, and if the fulfillment of it involves pain for an innocent individual it still has its force. But the claim of the public in such circumstances conflicts with the claim of the individual not to be pained, to be treated as an end, and sometimes the one claim, sometimes the other, is thought to be paramount in the circumstances. If it should be thought necessary to override the claim of the individual for the sake of the

Thus, the goal of protecting the rights of individuals from criminal invasions may require, or at least be furthered by, certain violations of the rights of innocent people. Perhaps even more frequently, the minimization of crime may be purchased at the cost of punishing some culpable offenders more severely than they deserve. But just as society makes a "promise" to the innocent that they will not be punished at all,[77] it makes a promise to the guilty that they will be punished no more than they deserve—society, in other words, has a prima facie duty to respect retributive limits on the amount of punishment inflicted on criminals.

In cases of conflict, which promise should be kept? What second-order principle should be adopted? That principle, as noted earlier, must permit the degree of violation of innocents' rights that necessarily accompanies systems of laws and penalties.[78] The justification for permitting such violations is that the suffering inflicted on blameless individuals, or the undeserved increment of punishment imposed on the guilty, is significantly less severe than the overall evil that systems of criminal justice prevent. The magnitude of the permissible difference between the harm prevented and the infliction of undeserved suffering, although difficult to delineate precisely, is suggested by the burden of proof requirement in criminal cases.

"Proof beyond a reasonable doubt" is constitutionally mandated for the elements of a criminal offense.[79] This standard strikes a balance between competing societal and individual interests.[80] Courts have indicated that, if quantified, the

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claim of society, our decision is coloured by compunction, which we express by saying that the claim of justice has to give way to that of utility.

Id. at 71-72.

77. [The law makes] a promise to the injured person and his friends, and to society. It promises to the former, in certain cases, compensation, and always the satisfaction of knowing that the offender has not gone scot-free, and it promises to the latter this satisfaction and the degree of protection against further offences which punishment gives. At the same time the whole system of law is a promise to the members of the community that if they do not commit any of the prohibited acts they will not be punished.

W. Ross, *supra* note 54, at 63-64.

78. *See* text following note 71 *supra*.

79. *See* Mullaney v. Wilbur, 421 U.S. 684, 704 (1975); *In re* Winship, 397 U.S. 358, 364 (1970).

80. [A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . . "Due process commands that no man shall lose his liberty unless the Government has borne the

probability of guilt associated with the reasonable doubt standard might be in the range of 95-99.9%.[81] The balance between competing societal and individual interests drawn by that strict standard indicates our willingness to let a significant number of guilty persons go free in order to prevent conviction of the innocent.

The relatively extreme preference afforded the right to be free from undeserved or undeservedly severe punishment over the need of society to protect itself from crime suggests the following second-order principle for deciding conflicts between fairness and utility: *The individual right to be treated as an end in oneself, the right of the innocent to go free and the guilty to suffer only proportionate penalties, may not be infringed, except in circumstances in which it is necessary to do so to protect others from more critically significant violations of their rights.*

D. Pluralism and Coercive Sentencing

Adoption of the pluralist view of punishment and the second-order principle suggested would have significant implications for coercive sentencing practices. Those implications may be summarized in two rules: first, it is morally impermissible to impose a greater sentence on a defendant than that justified by his individual culpability for the purpose of coercing cooperation by the defendant or others, except in the most compelling cases of social need; and second, because the general end of punishment is societal well-being, the state may impose less than the proportionate penalty on an offender if the overall

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burden of . . . . convincing the factfinder of his guilt." [Speiser v. Randall, 357 U.S. 513, 525-26 (1958).] To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." [Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 26 (Dec. 1967).]

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

In re Winship, 397 U.S. 358, 363-64 (1970). *See generally* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

81. *See* United States v. Fatico, 458 F. Supp. 388, 406 (E.D.N.Y. 1978); United States v. Schipani, 289 F. Supp. 43, 57 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969).

consequences of such leniency, including resultant guilty pleas, testimony, or informant services, would be better than those that would likely result from imposition of the maximum deserved sentence. It should be emphasized here that it is not a sufficient justification of an incrementally lower sentence that it brings about *some* desirable consequences. It must also be the case that any harmful consequences of such leniency (*e.g.*, decreased general deterrence) do not outweigh the good gained.[82] The retributive principle thus serves, except in cases of extreme necessity, as an upper limit on the penalty that may be imposed for any purpose, including the coercion of cooperation. The utilitarian principle, on the other hand, establishes a lower limit, below which punishment may not be reduced.

Consider, for example, a defendant who is convicted of a crime for which the statutorily authorized penalty is zero to ten years' imprisonment, and who possesses information that may be useful in the prosecution of other offenders. If the defendant has committed the crime under circumstances evincing maximum culpability, the trial court may justly impose a ten-year sentence.[83] However, if the court believes that an offer of a two-year "discount" from that sentence is both necessary and sufficient to induce the defendant to cooperate, and that the benefits to be gained outweigh any adverse impact of the lesser penalty on other goals of punishment, imposition of an eight-year sentence is justifiable. On the other hand, if the circumstances surrounding the offense suggest that the defendant is not nearly as culpable as others who commit the same crime, the maximum deserved penalty will be less than that legislatively permissible—for example, five years' imprisonment. In such a case, if a given degree of leniency would induce cooperation and satisfy utilitarian requirements, a sentence of less than five years is ethically defensible. But, except in cases of compelling need, the court may not permissibly threaten to impose a sentence of more than five years, even if under the circumstances no lesser threat will induce this defendant to cooperate. Such a punishment would exceed just desert and would therefore be unethical.

Of course, the upper or lower limit of justifiable punishment in an actual case is not susceptible of accurate, uniform,

82. *See* text accompanying notes 163-167, 175-182 *infra*.

83. This presupposes a rational sentencing structure under which the maximum authorized penalty is not more severe than warranted by any individual who commits the offense.

or verifiable determination.[84] The unique combination of background, beliefs, personal experience, and other circumstances that contribute to the make-up of individual judges ensures that moral intuitions about proportionality and predictions about consequences of a given sentence will vary widely among jurists. Moreover, these intuitions and predictions will even vary widely among a particular judge's dispositions of different defendants whose chacteristics seem, to an "outside observer," to be practically indistinguishable. The pluralist perspective, and the rules it implies, however, do not demand absolute consistency or complete agreement in the actual practices of courts. Rather, that perspective requires each judge to make his best effort to distinguish between the good consequences of a contemplated sentence and the fairness of that sentence, and to remain mindful that these two considerations are not conceptually or practically identical.

The mere fact that a proposed sentence is within statutory guidelines and otherwise useful does not alone establish its moral justifiability. Consistent with pluralism, judges must examine a defendant's crime and relative culpability and, based on shared cultural values without regard to other goals, determine the maximum fair sentence in the case. Judges may, then, within the limits previously described, grant leniency based on the belief that society's interests will thereby be best served. They may not, however, view defendants as resources to be utilized, without limitation, for the benefit of others. The adoption of a pluralist perspective thus commits one, not to the application of a rigorous formula for determining a sentence in each case, but to a sensitive recognition of the value of even criminal defendants as ends in themselves and not mere means.

For ease in explication in much of the following discussion, the terms "deserved," "fair," or "otherwise appropriate" punishment frequently may appear in such a way as to suggest that some uniquely and readily discernible penalty is being referred to. Such an implication is not intended. The terminology is simply a shorthand reference to the complex values and processes here described.

84. *See* notes 61-67 *supra* and accompanying text.

IV. LEGAL LIMITATIONS ON DIFFERENTIAL SENTENCING

However much our federal and state constitutions incorporate natural law or morality, it is generally inadequate in a legal brief to cite *Foundations of the Metaphysics of Morals*[85] or *The Right and the Good*[86] as controlling or even persuasive precedent on the validity of a judicially imposed sentence of incarceration. Therefore, assuming that the ethical permissibility of coercive sentencing, within the limitations described, is in fact fairly derived from justifiable moral norms, it is necessary to explain the relationship between those moral conclusions and positive law.

To the extent that any examination of coercive punishment is to have legal implications, it is necessary to examine the constitutional limitations on the threat of imposition of differential sentences to induce guilty pleas or other forms of cooperation. From its first inconclusive confrontation with these constitutional issues in *Shelton v. United States*,[87] until its most recent pronouncement in *Bordenkircher v. Hayes*,[88] the Supreme Court has failed to provide a clearly enunciated, conceptually adequate, or consistently applied framework for analysis. It is possible, however, to identify two approaches for assessing which, if any, coercive sentences are, or should be, constitutionally permissible: (1) differential sentences that "coerce" confessions, and (2) differential sentences that "unduly burden" constitutional rights. The following sections describe and evaluate the soundness of these approaches and the validity of the implications for differential sentencing that have been drawn from them.

A. Differential Sentences That "Coerce" Confessions

Supreme Court analysis of differential sentencing originated in *Shelton v. United States*, with J. Paul Shelton's guilty plea to federal charges of transporting a stolen vehicle. Shelton subsequently moved to vacate the conviction on the ground that his plea had been induced by several promises of the prosecution, including a commitment to recommend the one-year sentence that he, in fact, received.[89]

85. I. Kant, *supra* note 57.
86. W. Ross, *supra* note 54.
87. 356 U.S. 26 (1958).
88. 434 U.S. 357 (1978).
89. *See* Shelton v. United States, 242 F.2d 101, 103-04 (5th Cir.), *rev'd en*

A three-judge panel of the Fifth Circuit vacated the conviction.[90] The majority, in an opinion by Judge Rives, found a guilty plea to be the legal equivalent of a confession in open court,[91] and in so doing established one mode of analyzing the acceptability of a plea tendered in return for a proffered recommendation of a sentencing differential: if the inducement is of such a nature that a plea/confession resulting from it would be inadmissible under fifth amendment standards, the guilty plea it actually produces is invalid. Judge Rives concluded that *any* prosecutorial inducement, whether or not the bargain was kept, rendered the resulting plea/confession "involuntary" and unacceptable under the fifth amendment as a matter of law.[92]

Judge Rives did not, however, explicitly consider whether guilty pleas and confessions must always be subject to the same standards of validity. Confessions, often extracted in custodial surroundings without an impartial judicial officer or members of the public present, may be significantly more susceptible to constitutional infirmities than guilty pleas entered in open court after reflection upon information supplied by a judge and with the advice of counsel.[93] It is necessary, then, to determine whether the various standards of voluntariness used to measure the validity of confessions are applicable to the acceptance of guilty pleas induced by sentencing differentials.

1. *Tests of Voluntariness*

a. Truthfulness

For many years, widespread usage equated the term "voluntary" with the terms "reliable," "trustworthy," or "truthful"; the likely untrustworthiness of a coerced confession was gener-

banc, 246 F.2d 571 (5th Cir. 1957), *rev'd and remanded per curiam*, 356 U.S. 26 (1958).

90. 242 F.2d at 113.

91. *Id.* at 112.

92. If a plea of guilty is made upon any understanding or agreement as to the punishment to be recommended, it is essential, we think, that, before accepting such plea, the district court should make certain that the plea is in fact made voluntarily. Otherwise, the plea is subject to impeachment as having been induced by a promise of recommended leniency.

There is no doubt, indeed it is practically conceded, that the appellant pleaded guilty in reliance on the promise of the Assistant United States Attorney that he would receive a sentence of only one year. The court, before accepting the plea, did not ascertain that it was in truth and in fact a voluntary plea not induced by such promise.

Id. at 113 (footnote omitted).

93. *See* Brady v. United States, 397 U.S. 742, 754-55 (1970); Miranda v. Arizona, 384 U.S. 436, 445-58 (1966).

ally regarded as the sole rationale for its judicial exclusion.[94] Although a reasonable likelihood of a confession's trustworthiness, considered apart from other evidence of guilt, is no longer a sufficient condition of its validity,[95] it clearly remains a necessary condition.

Application of this test of voluntariness should not result in a per se rule rejecting any plea induced by sentencing differentials. A rule that *any* threat or promise excludes a resulting

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94. Professor Chadbourn, in his revision of Wigmore's treatise on evidence, wrote:

> In previous editions the thesis, supported by copious documentation, advanced as the basic reason for excluding a confession was this: "The principle . . . upon which a confession may be excluded is that it is, under certain conditions, *testimonially untrustworthy*." Accordingly, the test propounded as the fundamental criterion of admissibility was whether "the inducement [was] such that there was any fair risk of a false confession."
>
> . . . [I]t was concluded that:
>
> (a) A confession is not excluded because of any *breach of confidence* or of good faith which may thereby be involved. . . . (b) A confession is not excluded because of any illegality in the method of obtaining it. . . . (c) . . . [A] confession is not rejected because of any connection with the *privilege against self-incrimination.*

3 J. WIGMORE, EVIDENCE § 822, at 330 (rev. ed. J. Chadbourn 1970) (footnote omitted) (quoting J. WIGMORE, EVIDENCE §§ 822-824, at 247, 249, 252 (3d ed. 1940) (emphasis in original)).

95. It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession and even though there is ample evidence aside from the confession to support the conviction. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.

Jackson v. Denno, 378 U.S. 368, 376-77 (1964) (citations omitted). *See* Johnson v. New Jersey, 384 U.S. 719, 729 n.9 (1966); Miranda v. Arizona, 384 U.S. 436, 464 n.33 (1966).

Common usage certainly does not support the equivalence of "voluntariness" with "truthfulness," and most statutory formulations of the requirements of an acceptable plea now recognize that voluntariness is distinguishable from a separately identifiable and necessary condition of accuracy of the plea. For example, the Federal Rules of Criminal Procedure provide:

> (d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement.
>
> . . . .
>
> (f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

FED. R. CRIM. P. 11. *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.4(1), at 247-48 (1975).

plea would disregard the fundamental question of whether the confession was untrue. The appropriate test, dictated by the truthfulness rationale, can be stated as follows: Given the totality of the circumstances surrounding the confession, including any inducements proffered by the state, and without regard to independent proof of guilt, is there any substantial risk that the confession is untrustworthy? In the typical plea-bargaining situation, the question will thus be: Was the sentencing differential promised in return for a guilty plea so great that, under all the circumstances, there was a substantial risk that an innocent defendant might be induced to confess falsely?

Application of that test does not suggest that, as a general matter, guilty pleas, whether entered in hopes of leniency or to avoid enhancement of punishment, are constitutionally infirm. Although a sufficiently great difference in proposed sentences might induce a false plea, the likelihood that either promised leniency or enhancement of sentence would result in self-incrimination of the innocent is not sufficiently great to warrant a per se ban on plea bargaining.[96] Individualized judicial assessments of the circumstances surrounding particular pleas provide workable and adequate assurance that only those in fact guilty are convicted on their own pleas.

b. Informed Choice and Opportunity for Reasoned Deliberation

Judge Tuttle, in his dissent to the three-judge panel decision of the Fifth Circuit in *Shelton*,[97] argued that the appropriate test of voluntariness for guilty pleas, supported by both precedent[98] and administrative necessity,[99] was one requiring an informed choice[100] between alternatives not "tainted by any

96. *Cf.* Brady v. United States, 397 U.S. 742, 758 (1970) (court's examination of guilty plea and presence of defense counsel are generally adequate insurance of voluntary pleas).

97. 242 F.2d at 113.

98. *See* cases cited in 242 F.2d at 114 & nn.1-11.

99. Judge Tuttle was disturbed by the prospect that the majority decision of the three-judge panel, if not overturned, "would considerably impede the administration of justice" by rendering prosecutors unable to offer sufficient "inducements for any person to plead guilty." 242 F.2d at 115. Conceding that a prosecutorial promise might induce a guilty plea, he refused to accept that such a promise necessarily compromised the plea's voluntariness. *Id.*

100. The choice must also be a conscious one. A confession is not considered voluntary unless it is the product of the conscious choice of the defendant—that is, a manifestation of his will. *See* ALI MODEL PENAL CODE § 2-01, at 24 (Tent. Draft 1962). This condition of conscious volition is clearly satisfied by pleas entered because of promised sentencing differentials, whether those dif-

intentional or unintentional overreaching"[101] by the state. Thus, in addition to the requirements that a plea be both testimonially trustworthy and the product of a conscious act of will,[102] Judge Tuttle concluded that the waiver of fifth and sixth amendment rights must be *knowingly* made.

In some circumstances, the requirement of an informed waiver is related to the search for accuracy in conviction; if a defendant is misinformed about the elements of the offense to which he is confessing, he may, in fact, be innocent of that crime. The relationship of "knowing" to "accurate," however, is not invariable. The fact about which the accused may be misinformed may have no bearing on the nature of the crime charged, but rather on the scope of the possible penalty or the extent of the rights that he is being induced to give up by pleading guilty. In such contexts, the knowing waiver requirement is properly viewed as an element of fundamental fairness; it is simply unfair to bargain with an individual who is acting under a material misapprehension. This same fairness consideration is also manifested in the requirement that the defendant have an opportunity for reasoned deliberation. A confession is not valid if it is made in circumstances that substantially curtail the defendant's ability to carefully and critically identify and evaluate the advantages and disadvantages of waiving his constitutional rights.[103]

The requirements of informed choice and an opportunity for reasoned deliberation are both satisfied in the typical plea bargain. A defendant, informed by both prosecutor and court of the unpleasant but true available choices and aided by coun-

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ferentials represent morally permissible leniency or impermissible enhancement of the otherwise deserved penalty.

101. 242 F.2d at 115.

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

Id.

102. *See* note 100 *supra.*

103. *See* North Carolina v. Alford, 400 U.S. 25 (1970). An element of the same unfairness perceived in contract law between a competent party and an infant, mental defective, or other incompetent individual permeates the *quid pro quo* arrangement for a confession when the inducement is offered under circumstances sufficiently coercive to prompt an impulsive or improvident response to an apparent but unreal advantage.

sel in assessing their relative merits and implications, chooses to forgo trial after ample opportunity for reasoned deliberation.

c. Absence of Governmental Misconduct

Supreme Court decisions of the past thirty years clearly indicate that a confession, even if accurate, will be considered involuntary and thus inadmissible if it is induced under circumstances evincing governmental misconduct.[104] Although physical or psychological torture or abuse will clearly vitiate a confession, less abhorrent forms of impropriety will also suffice, including misrepresentations, unfulfilled or unfulfillable promises, or promises that are illegal or otherwise recognized as improper.[105]

It is with this requirement, that governmental conduct inducing a confession or plea be fair and morally acceptable, that constitutional doctrine begins to accommodate moral limitations on coercive sentencing. If a plea induced by fundamentally unfair or unethical conduct or promises is constitutionally

104. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960).

> [I]n cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. This insistence upon putting the government to the task of proving guilt by means other than inquisition was engendered by historical abuses which are quite familiar.
>
> But neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, "The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.

Id. at 206-07 (quoting Spano v. New York, 360 U.S. 315, 320-21 (1958)) (citations omitted).

105. *See* cases cited in Shelton v. United States, 242 F.2d 101, 114 nn.2-11 (5th Cir. 1957). Such conduct is neither logically nor invariably causally related to inaccuracy of the resulting plea. That a plea followed physical abuse or harassment, or a monetary bribe, may, under the totality of the circumstances, suggest that the plea was not truthful, but that conclusion is far from compelled. Furthermore, whether or not the prosecutor knows or intends that the inducing promise will not be kept is irrelevant to the truthfulness of a confession that is motivated by a belief in the prosecutor's sincerity. The plea is not invalid because of the likely effect on the defendant of an inducement of that nature; it is the illegal or immoral character of the inducement itself that is controlling, regardless of consequences.

infirm, then a plea resulting from threats of disproportionately severe punishment upon conviction after trial is also invalid, and the actual imposition of such sentences is impermissible. Application of the moral scheme earlier defended, and the perspective on punishment it implies, makes clear that while a defendant does indeed forfeit by his criminality his prima facie right not to be treated as a means to society's ends, that forfeiture is by no means absolute; the state may permissibly "use" him only to the extent that he has "used" others by violating their correlative rights. When the deserved, just, or fair penalty is exceeded, the incremental punishment represents as fundamental a violation of that defendant's rights as a person as would conviction and punishment of the innocent. It is as unfair, as great a violation of due process, to treat a guilty defendant in this way, however laudable the ends to be served, as it would be to punish an innocent scapegoat.

If societal ethical values are at all cognizable as constitutional limitations on state conduct in the pursuit of overall social well-being, then enhancement of the maximum proportionate sentence to coerce cooperation is impermissible. On the other hand, since leniency granted in return for a benefit conferred by the defendant on the state may, as demonstrated earlier, conform to acceptable moral principles,[106] plea negotiations involving such concessions are not violative of due process.

Evaluation of plea bargaining in accordance with fifth amendment principles governing the admissibility of confessions thus indicates that the moral limits on coercive sentencing previously derived are supported by established constitutional doctrines. The Supreme Court's assessment of the constitutionality of sentencing differentials has not, however, been limited to an analysis of guilty pleas as confessions. The sentence disparities between those who plead guilty and those who insist on trial has also been subject to judicial scrutiny as a burden on the exercise of constitutionally guaranteed rights.

B. Differential Sentences That Unduly Burden Constitutional Rights

Following the three-judge panel decision in *Shelton*, the case was reversed *en banc*, and Judge Tuttle's original dissent-

106. *See* text accompanying note 82 *supra*.

ing opinion became the majority position.[107] The majority of the full court thus adopted his proposed informed-choice test of voluntariness and its toleration of commitments by the prosecutor to induce guilty pleas.[108] When the case reached the Supreme Court, the Solicitor General confessed error on the ground that "the plea of guilty may have been improperly obtained,"[109] and the Court reversed the *en banc* decision of the Court of Appeals, in a memorandum opinion. The decision did not specify why or in what way the guilty plea might have been "improperly obtained," however, and therefore did not necessarily overrule the reasoning of the *en banc* decision below.[110] The ultimate disposition of the case was thus reached without an authoritative pronouncement on which, if any, of these potential criteria of voluntariness are constitutionally mandated. Not until *United States v. Jackson*,[111] decided ten years after *Shelton*, did the Supreme Court expressly analyze the constitutional significance of sentencing differentials imposed as a result of defendants' insistence on fifth and sixth amendment rights.

Jackson involved a constitutional challenge of a provision of the Federal Kidnapping Act that authorized the death penalty for a defendant convicted by a jury, but set forth no procedure for imposing the death penalty on a defendant who waived the right to a jury trial or who pleaded guilty.[112] In determining "whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury,"[113] Justice Stewart's majority opinion first considered the subjective

107. Shelton v. United States, 246 F.2d 571 (5th Cir. 1957), *rev'd and remanded per curiam*, 356 U.S. 26 (1958).

108. 246 F.2d at 572 n.2.

109. Shelton v. United States, 356 U.S. 26, 26 (1958) (per curiam).

110. The Fifth Circuit apparently did not believe that the Supreme Court overruled the reasoning of the *en banc* decision, and continued to apply Judge Tutle's test of voluntariness. *See, e.g.*, Cooper v. Holman, 356 F.2d 82 (5th Cir.), *cert. denied*, 385 U.S. 855 (1966); Busby v. Holman, 356 F.2d 75 (5th Cir. 1966); Martin v. United States, 256 F.2d 345 (5th Cir.), *cert. denied*, 358 U.S. 921 (1958).

111. 390 U.S. 570 (1968).

112. At the time of *Jackson*, the Federal Kidnapping Act provided:

> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Act of June 25, 1948, ch. 645, § 1201(a), 62 Stat. 760 (current version at 18 U.S.C. § 1201(a) (1976)).

113. 390 U.S. at 581.

impact of the potential sentencing differential on a defendant's volition. As an empirical matter, the Court assumed that the inevitable effect of the provision was "to discourage assertion of the fifth amendment right not to plead guilty and to deter exercise of the sixth amendment right to demand a jury trial."[114] Justice Stewart denied, however, that such "discouragement" and "deterrence" were necessarily sufficient to render resultant guilty pleas invalid. "Encouragement" was not, he held, necessarily equivalent to impermissible "compulsion."[115] Although the "encouragement" of the waiver of rights did not necessarily make a plea "involuntary," the absence of "coercion" did not necessarily insulate that plea from successful constitutional attack.

The *Jackson* Court divided statutory provisions that "encouraged" without necessarily compelling pleas into three classes with respect to their constitutional validity: (1) "[i]f the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional";[116] (2) if the purpose of the statutory scheme was to serve a valid governmental interest, and if the resultant impact on implicated rights was necessary and not excessive, the provision would be constitutional;[117] and (3) if the provision unnecessarily or excessively encouraged the waiver of rights, it would be unconstitutional.[118]

The Government argued in *Jackson* that imposing the death penalty only after a jury trial and the jury's recommendation served a valid governmental interest by avoiding the more drastic alternative of mandatory capital punishment in every case. Although the Court acknowledged the desirability of mitigating the severity of punishment, it found that the means employed by the Act resulted in an "unnecessary and therefore excessive" chill on constitutional rights.[119]

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114. *Id.*
115. *Id.* at 583 & n.25.
116. *Id.* at 581.
117. *Id.* at 582.
118. *Id.* at 583.
119. The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to the question is clear. The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial. In some States, for example, the choice between life

Although *Jackson* dealt directly only with the constitutionality of a death sentence imposed pursuant to statute, and not with the validity of a plea induced by the threat of such a sentence, its potential implications with respect to plea bargaining as a general practice were clear. *Jackson* and several criminal procedure decisions[120] had found unjustifiable actions that made the exercise of a constitutional right so burdensome that an individual would hesitate to assert the right. A system of plea bargaining has similar effects. The chance of obtaining a reduced sentence after a guilty plea (and the concomitant prospect of a heavier sentence if convicted after a trial) makes accused criminals hesitant to assert their constitutional rights to plead not guilty and to have a jury trial. Thus, the practice of plea bargaining, it might appear, is unconstitutional.[121]

Whatever doubts *Jackson* cast on the constitutionality of plea bargaining were soon dispelled in *Brady v. United States*[122] and *Parker v. North Carolina*.[123] In the first of these cases, Robert Brady and a codefendant were accused of violating the section of the Federal Kidnapping Act that *Jackson* subsequently invalidated. After Brady had pleaded not guilty, he discovered that his codefendant would testify against him at trial. Brady then changed his plea to guilty, thereby reducing his potential maximum sentence from death to life imprisonment.[124] In the second case, Charles Parker was arrested and questioned in connection with a burglary and rape. After long interrogation he confessed. By pleading guilty, Parker avoided the possibility of conviction for first-degree burglary, a capital crime, and was assured a mandatory sentence of life imprisonment.[125]

> imprisonment and capital punishment is left to a jury in *every* case—regardless of how the defendant's guilt has been determined. Given the availability of this and other alternatives, it is clear that the selective death penalty provision of the Federal Kidnapping Act cannot be justified by its ostensible purpose. Whatever the power of Congress to impose a death penalty for violation of the [Act], Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.

Id. at 582-83 (footnote omitted) (emphasis in original).

120. Garrity v. New Jersey, 385 U.S. 493, 500 (1967); Griffin v. California, 380 U.S. 609, 614 (1965); Malloy v. Hogan, 378 U.S. 1, 13-14 (1964). *See* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

121. *See* Note, *supra* note 120, at 1407.

122. 397 U.S. 742 (1970).

123. 397 U.S. 790 (1970).

124. 397 U.S. at 743.

125. 397 U.S. at 791-93.

Following the decision in *Jackson*, both men collaterally attacked their convictions. Each asserted that his plea was involuntary because it was a product of an unconstitutional statutory scheme. The majority of the Court affirmed the lower court decisions denying relief in both cases. By holding that a differential sentencing scheme so extreme as to involve a defendant in a potential choice between life and death did not run afoul of any test of voluntariness thus far identified,[126] the Court a fortiori affixed its imprimatur on plea bargaining generally. The majority opinion reasoned that since the motivation behind Brady's guilty plea—the availability of his codefendant's incriminating testimony—was independent of the statute, the statutory scheme was not causally related to the voluntariness, however defined, of Brady's waiver of his rights.[127]

The soundness of that finding is questionable as a matter of simple psychology. It is difficult to imagine that a defendant's decision to plead guilty will be affected by the likelihood of conviction, but not by the consequences of that conviction compared to the consequences of a guilty plea. But even assuming that Brady had pleaded guilty in order to avoid the possibility of the death sentence, as was unquestionably true in *Parker*, the Court concluded that his plea was not involuntary for that reason.

The Court simply noted that *Jackson* did not hold that all encouraged guilty pleas are invalid, whether involuntary or not.[128] The Court did not explicitly consider the requirement in *Jackson* that the encouragement of the plea, or conversely, the burden on assertion of constitutional rights, not be unnecessary or overly great. Nor did *Brady* and *Parker* deal with earlier decisions such as *Malloy v. Hogan*,[129] *Griffin v. California*,[130] and *Garrity v. New Jersey*,[131] in which the Court

126. The Court concluded that the plea was a product of the defendant's conscious choice. 397 U.S. at 750 (there had been no "actual or threatened physical harm or . . . mental coercion overbearing the will of the defendant"). Furthermore, the Court did not doubt the plea's truthfulness. *Id.* at 758 ("Although Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful."). Finally, the Court concluded that the requirements of informed choice and an opportunity for reasoned deliberation were met as long as the defendant was adequately represented by counsel. *Id.* at 754.

127. *Id.* at 749-50.

128. *Id.* at 747.

129. 378 U.S. 1 (1964).

130. 380 U.S. 609 (1965).

131. 385 U.S. 493 (1967).

prohibited conditioning receipt of a benefit (or avoidance of a burden) on forfeiture of the constitutional protection against self-incrimination. The pressures that the defendants faced in those cases were not more severe than those in the typical plea-bargaining case, and were almost certainly less severe than those confronting Brady and Parker.

The Court, however, suggested two practical goals of plea bargaining that would distinguish the practice from earlier self-incrimination holdings and arguably justify the burden on constitutional rights: first, administrative efficiency—the rapid and less costly processing of defendants through the criminal justice system;[132] and second, the effective rehabilitation of malefactors—"a defendant . . . who demonstrates by his plea that he is ready and willing to admit his crime . . . enter[s] the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary."[133] The Court did not, as to either justification, explicitly consider the critical moral difference between leniency in return for a plea and enhancement of sentence in retaliation for the assertion of trial-related rights. Certainly administrative efficiency is served by both leniency and enhancement; both serve to coerce the guilty pleas that grease the cogs of the judicial machine. Nonetheless, the Court left open in a footnote the possibility that such enhancement might be impermissible:

> We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty. In Brady's case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty.[134]

Also conspicuously absent from the Court's discussion was any mention of its decision in *North Carolina v. Pearce*,[135] decided the previous year. *Pearce*, and its companion case, *Simpson v. Rice*,[136] involved respondents who had been convicted of a crime and sentenced to a prison term. Several years later, the original convictions of each were set aside for constitutional error, and on retrial, each respondent was convicted and resentenced. In one case, the sentence imposed, when added to the

132. 397 U.S. at 752.
133. *Id.* at 753.
134. *Id.* at 751 n.8.
135. 395 U.S. 711 (1969).
136. *See id.* at 711 n.*.

time already served, amounted to a longer total sentence than that originally imposed; in the other, the defendant received a longer sentence with no credit given for time already served. In neither case was any justification given for imposition of the longer sentence. The Supreme Court held that the fifth and fourteenth amendments prohibit enhanced punishment imposed as a penalty on those asserting their constitutional rights.[137]

The *Brady* Court made no effort to explain why a longer prison sentence imposed as the result of assertion of rights of appeal violated due process, while longer prison sentences, or even death, imposed for assertion of trial rights did not. Was there no arguable end of administrative efficiency served in *Pearce* by discouraging appeals? If insistence on trial indicates lack of contrition, are not those who insist on appealing convictions for crimes of which they are subsequently found guilty equally unlikely candidates for rehabilitation, and therefore properly subjected to longer prison sentences? These fundamental questions went unanswered, and unasked, until the Supreme Court's most recent pronouncement on plea bargaining—*Bordenkircher v. Hayes*.[138]

C. Recent Cases: *Bordenkircher v. Hayes* and *Corbitt v. New Jersey*

Paul Lewis Hayes was indicted by a grand jury on a charge of uttering a forged instrument in the amount of $88.30, an offense punishable by a term of two to ten years in prison. After arraignment, and during conferences with Hayes and his attorney, the prosecutor offered to recommend a prison sentence of five years in return for a guilty plea to the indictment. He also warned that if Hayes did not plead guilty and "save the court the inconvenience and necessity of a trial,"[139] he would seek a new indictment under the Kentucky Habitual Criminal Act,[140]

137. *Id.* at 724-25.

> Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

Id. at 725.

138. 434 U.S. 357 (1978).

139. *Id.* at 358.

140. Ky. Rev. Stat. § 431.190 (repealed 1974) (current version at § 532.080 (Supp. 1976)).

which would expose Hayes to a mandatory sentence of life imprisonment by virtue of his two prior felony convictions. Hayes rejected the proffered bargain, and the prosecutor obtained the threatened Habitual Criminal indictment.

Hayes was subsequently found guilty on the forgery charge and, following a determination that he had been twice before convicted of felonies, was sentenced to a life term in prison. The Kentucky Court of Appeals rejected constitutional challenges to the enhanced sentence. In its subsequent denial of Hayes' petition for a federal writ of habeas corpus, the United States District Court agreed that there was no constitutional infirmity in the sentence or indictment procedure.[141]

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment.[142] Although recognizing "that plea bargaining now plays an important role in our criminal justice system,"[143] the appellate court found that the prosecutor's conduct violated the due process requirements of *North Carolina v. Pearce*[144] and its progeny, *Blackledge v. Perry*,[145] which extended the rule of *Pearce* to protect defendants from the vindictive exercise of a prosecutor's discretion.

The Supreme Court granted certiorari and reversed the Sixth Circuit's judgment. The Court agreed with the proposition that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the state to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' "[146] The Court, however, attempted to distinguish the "punitive" context of *Pearce* and *Perry* from the assertedly "arms-length bartering" of plea negotiations, stating that "[i]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."[147] The Court contrasted the permissible negotiations involved in *Bordenkircher* with the impermissible situation "where the prosecutor, without notice brought an additional and more serious charge after plea negotiations relat-

141. 434 U.S. at 360 (citing Hayes v. Cowan, 547 F.2d 42, 45 (1976)).
142. Hayes v. Cowan, 547 F.2d 42, 45 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, 434 U.S. 357 (1978).
143. 547 F.2d at 43.
144. 395 U.S. 711 (1969).
145. 417 U.S. 21 (1974).
146. 434 U.S. at 363.
147. *Id.*

ing only to the original indictment had ended with the defendant's insistence on pleading not guilty."[148]

The precise nature of the distinction that the Court recognizes between *Pearce* and *Perry*, on the one hand, and *Bordenkircher*, on the other, is not clearly discernible in either the language or reasoning of the opinion. One possible distinction is suggested by the emphasis placed on both the timing of the prosecutorial decision to reindict, and the difference between "retaliation for" the defendant's exercise of rights and "deterrence of" the exercise of those same rights. If the prosecutor's motivation for subjecting a defendant who fails to plead guilty to potentially more severe punishment is "backward-looking"—that is, vengeance, retribution, or mere pique at the defendant's action—the procedure is impermissible; if, on the other hand, the motive is "forward-looking," and designed to obtain a bargained-for benefit for the state, it is valid, even

148. *Id.* at 360.

> In [*Pearce* and *Perry*] the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power." [Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., concurring).] The Court has emphasized that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.
>
> . . . .
>
> Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. [Brady v. United States, 397 U.S. 742, 752 (1970).] Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, common acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.
>
> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." [Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1977).] It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Id. at 362-64 (citations omitted).

though the greater sentence ultimately meted out amounts to a cost imposed on the exercise of constitutionally guaranteed rights.

The state may, under such a view, threaten sentencing differentials as part of an overt negotiating practice explicitly designed to deter the exercise of a legal right. The state may, in fact, impose higher sentences on those who reject a *quid pro quo* and continue to insist on the exercise of that right if the motivation is "general deterrence"—that is, warning future defendants that exercise of the right will in fact be costly. The state may not, however, impose incrementally greater sentences solely to punish the exercise of legal rights with no view toward chilling their future exercise by others and thereby furthering the ends arguably served by plea bargaining.

A sound distinction between the permissible sentencing differential based on the exercise of trial rights in *Bordenkircher*, and the impermissible differentials based on the exercise of rights of appeal in *Pearce* and *Perry* cannot, however, be based on the fact that in the latter cases the prosecutorial or judicial motivation was, or at least appeared to be, purely retaliatory. If motivation is viewed as the critical element, it would be permissible for a trial court to announce explicitly, or follow implicitly, a policy of sentencing more severely those defendants who indicate an intention to appeal their convictions, on the ground that the motivation for the practice is not to punish the assertion of the right, but rather to conserve appellate judicial resources by deterring its exercise. Because it is difficult to conceive of even the *Bordenkircher* majority countenancing such a practice, the motivation of the trial court cannot be the sole determinant of the validity of differential sentencing.

A much more defensible distinction between sentencing differentials following appeal and those involved in plea bargaining may be grounded in the ethical limitations on punishment proposed earlier.[149] That scheme prohibited the enhancement of the just, fair, or proportionate sentence in any case merely to serve utility, but permitted leniency or "discounts" from the maximum appropriate sentence if such treatment was conducive to desirable social ends. The distinction between "punitive" differentials such as those in *Pearce* and *Perry*, and "negotiated-for" differentials given in exchange for

149. *See* pp. 694-98 *supra*.

guilty pleas is that the former involve, or appear to involve, enhancement of appropriate penalties, while the latter often involve only permissible leniency.

When a given defendant has been sentenced for a particular offense, the state has, through its judicial officer, expressed its view of the appropriate penalty. An enhancement of that sentence following appeal and reconviction, in the absence of newly discovered and penologically significant information about the crime or criminal, suggests that the court is attempting to deter exercise of the right of appeal. In the typical plea-bargaining situation, on the other hand, there is no affirmative official indication that the charges initially filed or the indictment originally brought will result in a more severe disposition of the case than the prosecutor, in the sound exercise of his discretion, believes appropriate. Absent such an affirmative showing, courts are extremely reluctant to scrutinize the reasonableness of the prosecutor's charging decision, and will generally defer to his judgment of appropriate charge and concessions.[150]

Although this distinction, if factually accurate, would accord with ethical norms, it is difficult to find support in *Bordenkircher*. In a dissenting opinion, Justice Powell argued forcefully that the prosecutor's proffered inducement to plead guilty did not consist of an offered "discount" from the otherwise proportional sentence merited by Hayes' crime and background.[151] Rather, Justice Powell argued, the sentence of life imprisonment threatened and imposed was more excessive than permissible under any practice with due regard for the dignity of the individual and his right to be treated as an end in himself, and not as an object of potential social utility. The prior offenses that brought Hayes within the literal terms of the Habitual Criminal Act did not themselves result in any actual term of imprisonment.[152] Nevertheless, the addition of a conviction on a charge involving no personal injury, and property interests of only $88.30, resulted in a sentence of life imprisonment. As Justice Powell noted, "Persons convicted of rape and

150. Although defendants may believe that their insistence on trial will result in an impermissible penalty, rather than withheld leniency, they will have no firm evidence on which to base such a conclusion.

151. 434 U.S. at 370 (Powell, J., dissenting).

152. At the age of seventeen, Hayes was charged with rape but was permitted to plead guilty to the lesser included offense of detaining a female and was sentenced to a nonprison reformatory for five years. Subsequently, Hayes was convicted of robbery and received probation and a five-year suspended sentence. *Id.* at 362-64.

murder often are not punished so severely."[153]

That the sentence ultimately imposed was unjustifiable under any formula for balancing the public interest against justice to individuals was, Justice Powell argued, demonstrated by the prosecutor's own actions:

> It seems to me that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place. The deference that courts properly accord the exercise of a prosecutor's discretion perhaps would foreclose judicial criticism if the prosecutor originally had sought an indictment under that Act, as unreasonable as it would have seemed. But here the prosecutor evidently made a reasonable, responsible judgment not to subject an individual to a mandatory life sentence when his only new offense had societal implications as limited as those accompanying the uttering of a single $88 forged check and when the circumstances of his prior convictions confirmed the inappropriateness of applying the habitual criminal statute. I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment.[154]

In *Bordenkircher*, as in *Pearce* and *Perry*, official action indicated that an enhanced penalty was being imposed for the exercise of a right. The majority in *Bordenkircher* did not expressly acknowledge or consider the force of this argument, as would seem to be required if the enhancement/leniency dichotomy lay at the heart of their reasoning. If indeed the Court does not reject Justice Powell's conclusions, then the majority opinion goes distressingly far toward sanctioning the use of unfair and ethically impermissible means to legitimate ends. The Court's subsequent decision in *Corbitt v. New Jersey*[155] does, however, suggest a less extreme reading of *Bordenkircher*.

Corbitt involved a constitutional challenge to New Jersey's homicide statute, which provides for mandatory life imprisonment for a defendant convicted of first-degree murder by a jury, but permits the imposition of a lesser sentence if the defendant pleads non vult or nolo contendere.[156] Corbitt, after pleading not guilty to a murder indictment, was convicted by a jury of first-degree murder and sentenced to life imprisonment. The New Jersey Supreme Court affirmed, rejecting the appellant's equal protection claim and his contention that the possibility of a sentence of less than life upon the plea of non vult and the absence of a similar possibility when found guilty by a jury of

153. *Id.* at 370.
154. *Id.* at 370-71 (Powell, J., dissenting) (footnotes omitted).
155. 439 U.S. 212 (1978).
156. *See id.* at 214-15 n.1 (quoting N.J. STAT. ANN. § 2A:113-1; *id.* §§ 2A:113-2 to -4 (repealed 1978)).

first-degree murder was an unconstitutional burden on his rights under the fifth, sixth, and fourteenth amendments.[157]

In affirming the decision of the New Jersey Supreme Court, the United States Supreme Court focused on the permissibility of affording leniency in return for waivers of rights, but implied that enhancement for assertion of rights would not withstand constitutional scrutiny:

> [I]t is not forbidden to extend a proper degree of leniency in return for guilty pleas. New Jersey has done no more than that.
>
> We discern no element of retaliation or vindictiveness against Corbitt for going to trial. There is no suggestion that he was subjected to unwarranted charges. Nor does this record indicate that he was being punished for exercising a constitutional right. Indeed, insofar as this record reveals, Corbitt may have tendered a plea and it was refused. There is no doubt that those homicide defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed. Those cases, as we have said, unequivocally recognize the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based.[158]

It is at least arguable, then, that in light of *Corbitt, Bordenkircher* should not be read as condoning enhancement of appropriate sentences for coercive purposes.

Although absence of enhancement is a necessary moral precondition of a valid differential, and possibly a legal precondition as well, it is not sufficient. Before any "encouragement" of waiver of rights by proffered leniency can be tolerated, *Jackson* requires that two inquiries be made: (1) whether the ends served by the practice are sufficiently compelling to outweigh the burden imposed on the exercise of constitutional rights, and (2) whether the means that impose such a burden are indeed necessary to serve those ends.[159] Neither of these inquiries received detailed consideration in *Bordenkircher*, and yet without such consideration a defensible position on the issues in the case cannot be formulated. The following section undertakes the required evaluation.

V. JUSTIFICATIONS FOR PLEA BARGAINING

In defense of its initial approval of plea bargaining, the American Bar Association exhaustively marshalled the variety

157. State v. Corbitt, 74 N.J. 379, 378 A.2d 235 (1977).
158. *Id.* at 223-24 (footnotes omitted).
159. *See* United States v. Jackson, 390 U.S. 570 (1968).

of justifications traditionally appealed to in the case law and literature.[160] Guilty pleas, it urged, render charge and sentence concessions appropriate because they: (1) increase the promptness and certainty with which correctional measures are applied to defendants; (2) indicate the defendant's willingness to assume responsibility for his crime; (3) make it possible to select alternative correctional measures that either are better adapted to the goals of rehabilitation, deterrence, and incapacitation than the disposition available upon conviction after trial on the initially charged offense, or serve to protect the defendant from undue harm caused by the form of conviction; (4) make public trial unnecessary under circumstances in which such a trial would have a deleterious impact on state or individual interests; (5) allow cooperation that may result in the successful prosecution of other equally dangerous or more dangerous offenders; and/or (6) aid in avoiding delay in processing other cases through the criminal justice system.[161] It is significant to note that the ABA limited its pursuit of these goals to offers of leniency in return for a plea and thus did not sanction enhanced sentences as a tool of plea inducement.[162]

A. Ensuring Certain and Prompt Correctional Measures

In justifying plea bargaining on the basis that "punishment need not be as severe if it is certain and prompt in application,"[163] the ABA commentary drew on Bentham's conclusion that punishment is most effective if it is swift and certain.[164] Swift and certain punishment, the commentary continued, "aids in the deterrence of others and in accomplishing rehabili-

160. *See* ABA Standards Relating to the Administration of Criminal Justice, 299-303 (1974).

161. *Id.* § 1.8(a), at 308.

162. The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty or nolo contendere.

Id. § 1.8(b), at 308.

163. ABA Standards Relating to Pleas of Guilty 39 (1968).

164. Rule VIII.—*Punishment must be further increased in point of magnitude, in proportion as it falls short in point of proximity.*

The profit of a crime is commonly more certain than its punishment; or, what amounts to the same thing, appears so to the offender. It is generally more immediate: the temptation to offend is present; the punishment is at a distance. Hence, there are two circumstances which weaken the effect of punishment, its *uncertainty* and its *distance.*

J. Bentham, *Principles of Penal Law*, in 1 Works of Jeremy Bentham 365, 401 (J. Bowring ed. 1843) (emphasis in original).

tation of the individual defendant."[165] This reliance on Benthamite doctrine to support plea concessions is, however, either conceptually misplaced or empirically unsupported.

Few modern writers view rehabilitation as a realistic goal. The practical failure of the rehabilitative approach has been so complete that there has been a near about-face in the perspective from which punishment is viewed.[166] The argument that the shortening of the period between apprehension and imposition of sentence can serve an otherwise unattainable goal flies in the face of practical experience.

If the goal of rehabilitation is unrealistic, does the goal of incapacitation justify plea bargaining? If a system of plea bargaining ensures that some individual defendants who would otherwise escape conviction after trial are subjected to punishment after a plea, then the goal of incapacitation *as to those defendants* is enhanced. But because it is necessary to offer similar leniency to others who would have been convicted even after trial, the goal of incapacitating those defendants for as long as is fair or just is disserved. Bluntly put, while some de-

165. ABA STANDARDS RELATING TO PLEAS OF GUILTY 40 (1968).

> A defendant who enters a plea of guilty or nolo contendere may substantially contribute to the promptness of his punishment. If a plea of not guilty were entered, the case would have to be placed upon the trial calendar for trial at a later date; if the docket is crowded or the preparation is complex or essential participants are unavailable, a substantial interval of time may elapse before trial. In some cases the mere trial of the case would itself consume a considerable period of time. If a defendant by his plea makes avoidance of these delays possible, it is not inconsistent with the objectives of the system to grant charge or sentence concessions.
>
> A defendant who enters a plea of guilty or nolo contendere may, in some cases, substantially contribute to the certainty of his punishment. It has been noted that a 'common reason' why guilty pleas are sought 'is the weakness of the State's case due to factors beyond the control of the prosecution.' An uncooperative victim or witness may make conviction unlikely. Or, the nature of the offense may be such that a guilty verdict from a jury would be unlikely even in the face of conclusive evidence.' Because 'it is wiser to inflict some certain punishment than to hazard the escape of an offender after an expensive trial, plea discussions in such a case by the prosecutor would be appropriate. The granting of charge and sentence concessions would likewise be proper in such circumstances, for the defendant who has decided to forego the chances of acquittal (which exist to some degree in almost every case) has thereby made a sufficient contribution to the certainty of punishment to justify some diminution in the degree of punishment.

Id. at 40-41.

166. *See, e.g.*, A. VON HIRSCH, *supra* note 4, at 3-4; FAIR AND CERTAIN PUNISHMENT, *supra* note 4, at 73-75; Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 25 (1974); Morris, THE FUTURE OF IMPRISONMENT: TOWARD A PUNITIVE PHILOSOPHY, 72 MICH. L. REV. 1161, 1161 (1974).

fendants who would otherwise go scot-free are incapacitated for a time, many more are incapacitated for significantly shorter periods than would otherwise be the case. As incarceration comes to be viewed largely as a tool for maximally protecting society from dangerous, incorrigible felons, the value of this plea-bargaining tradeoff becomes questionable.

As to general deterrence, the ABA model is simply misconceived. The Benthamite model upon which the ABA builds posits a potential offender rationally weighing the consequences of either committing or refraining from committing a particular criminal act. The deterrent effect on the individual is a function of both the likelihood that he will be caught and the severity of the punishment that will be imposed. Plea bargaining, however, does nothing either to increase the likelihood of apprehension of a criminal, or to lessen the likelihood of nonconviction after trial; it merely induces some defendants, after apprehension, to forgo the possibility of acquittal.

The effect of plea bargaining on general deterrence may, in fact, be negative. An individual contemplating crime, to the extent that he thinks about it at all, will realize that if he is caught he can, by astute bargaining, reduce his sentence to substantially less than that otherwise thought necessary to optimally protect society. Similarly, a defendant who has actually been apprehended and sentenced on his guilty plea will realize that the antecedently threatened sanction for his conduct is reserved for those foolish enough not to deal in the prosecutorial marketplace. For those such as him, however, the price of crime is reduced to bargain-basement rates. Is a "consumer" in such a system likely to be more or less intimidated in the future by the threat of punishment than one who has risked and, in fact, faced the full force of a sanction otherwise appropriate?

Perhaps recognizing that there is no empirical evidence to support, and much impressionistic evidence to refute, the view that leniency in return for a plea serves the traditional goals of punishment, the ABA has deleted the original provision authorizing concessions to the defendant on these grounds.[167]

B. Indication of Genuine Remorse

A second proffered justification, from a penological perspective, for differential sentencing is that a guilty plea evinces a defendant's genuine remorse and thus indicates that he is a

167. ABA Standards Relating to Pleas of Guilty (Tent. Draft 1979).

less serious threat to society, is more amenable to rehabilitation, and is less deserving of retributive suffering.[168] To the extent that this justification relies on the discredited rehabilitative ideal, however, it is subject to the same criticism as the previously considered justification. Furthermore, the asserted empirical connection between the "mea culpa" of a guilty plea on the one hand, and dangerousness or wickedness on the other, is in large part a judicial or scholarly fiction. Often, a glib willingness to admit guilt in return for a sentencing concession indicates the opposite of repentance, while a failure to confess may be motivated by just the sort of shame and vulnerability to censure that mark true contrition.[169]

C. Allowing for Flexible Sentencing

Because of the relatively "coarse" nature of grading and definition in criminal codes, and the existence of legislatively enacted maximum and minimum sentences for certain offenses, a charge that technically fits a defendant's provable actions may carry a penologically inappropriate penalty. Charging concessions in return for guilty pleas, it is argued, allow for more appropriate individualized disposition of a case.[170]

It is undoubtedly true that current sentencing structures

168. *See* ABA Standards Relating to Pleas of Guilty, Comment to § 1.8(a)(ii), at 41-45 (1968).

169. *See* Scott v. United States, 419 F.2d 264, 270-71 (D.C. Cir. 1969). It is true, of course, that in some cases a guilty plea indicates genuine repentance—most often in blue-collar or white-collar crime, when an otherwise law-abiding, perhaps model member of the community, is charged with accepting bribes or income tax evasion. Humiliated before his family and friends and financially ruined by the burden of legal representation, the full reality of his wrongdoing becomes apparent, and he is not in need of incapacitation, rehabilitation, or specific deterrence. In such a case, however, the defendant is punished for none of these reasons, but only for general deterrence—the example of this defendant's imprisonment will presumably indicate to others the risk that they take by engaging in similar criminal activity. The deterrent effect of such punishment is undermined by plea bargaining to the extent that leniency as to this defendant results in a lesser punishment than the maximally deterrent legal sentence otherwise justified.

170. *See* ABA Standards Relating to the Administration of Criminal Justice § 1.8(a)(iii), at 308 (1974); ABA Standards Relating to Pleas of Guilty 45-47 (1968). Aristotle presented this view of the essential and equitable need for discretion in the sentencing function:

> "[A]ll law is universal. But there are some things about which it is not possible to speak correctly in universal terms. [When] the law speaks universally, but the case at issue happens to fall outside the universal formula, it is correct to rectify the shortcoming, in other words, the omission and mistake of the lawgiver due to the generality of his statement. Such a rectification corresponds to what the lawgiver himself would have said if he were present and what he would have enacted if he had known of [this particular case]. And this is the very nature of

shackle judicial discretion in perhaps undesirable ways and impose unjust burdens on those convicted of certain offenses. It is equally true that the exercise of charging discretion in return for a guilty plea eliminates or reduces these undesirable hardships or dispositions. A demonstrable means-ends relationship, however, is not sufficient to justify a practice that substantially burdens a defendant's rights. It must further be shown that no less restrictive means is available to serve the desired ends.[171]

In fact, a less restrictive alternative is not only available, but required by the professional ethics of the prosecutor. By hypothesis, a defendant who receives a charging *concession* in return for a plea was initially charged with a more serious offense. If the ultimate disposition following a plea and reduction of charge is the fair, just, or appropriate result in the case, then the higher initial charge was necessarily unfair, unjust, or inappropriate, even if premised on facts that could be proven at trial.[172] The sound exercise of prosecutorial discretion, however, requires the prosecutor to initially charge the appropriate offense,[173] regardless of the defendant's likely plea.

It is true that a defendant who is initially charged with the lower, but appropriate, offense may escape conviction at trial, while plea bargaining would ensure his conviction. The alternative, however, subjects defendants who will not waive their rights to conviction and punishment under a statutory provision that is, by hypothesis, unjust in its application. That is surely an unfair and unnecessary burden on defendants. Furthermore, efforts to ameliorate the undue harshness of legislatively permitted or required penalties by means of the plea-bargaining process may be counterproductive, serving to fore-

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the equitable, a rectification of law where law falls short by reason of its universality.

ARISTOTLE, NICHOMACHEAN ETHICS 141-42 (M. Ostwald trans. 1962) (book V, ch. 10).

171. In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted).

172. Such prosecutorial "overcharging" is a frequently used tactic in the plea-bargaining "game." *See* Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 293-94 (1972).

173. *See* ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, §§ 3.8-3.9, at 90-98 (1971); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3, at 244-45 (1975).

stall necessary reform of unreasonable grading provisions in existing criminal codes.

D. Making Public Trials Unnecessary

The ABA commentary also justifies sentencing concessions on the ground that the state or crime victim's interests would be disserved by the public trial that would otherwise be necessitated.[174] The brevity of the ABA's treatment of this justification, however, is commensurate with its practical significance. The number of cases in which a plea bargain serves the purpose of avoiding an undesirable public trial is small compared to the total number of plea bargains. Accordingly, while the ends served are by no means insignificant, this rationale is not alone sufficient to justify the plea-bargaining system.

E. Inducing Cooperation in the Prosecution of Others

Much more significant in numbers and in social impact are sentencing concessions given in return for a defendant's testimony or information about others involved in more serious crimes. Because these bargains involve more than confession of individual guilt and waiver of the right to trial, they will be considered in detail in section VI.

F. Administrative Necessity

Administrative necessity has unquestionably played the most significant role in the justification of plea bargaining. There are currently insufficient quantities of judicial and other necessary trial resources to provide a trial in more than a small percentage of cases.[175] Previously considered reliance on notions of the increased penological effectiveness of plea bargaining thus masks in philosophical rhetoric the reality that motivates support for the practice; without massive infusions of funds and training, criminal justice systems in many areas would grind to a halt.

Do the administrative needs of the criminal justice system—in reality the *only* social interest served by the vast ma-

174. *See* ABA Standards Relating to Administration of Criminal Justice § 1.8(a)(iv), at 308 (1974); ABA Standards Relating to Pleas of Guilty 47-48 (1968) (desire to avoid public trials for rape, indecent liberties, espionage).

175. ABA Standards Relating to Pleas of Guilty 49-51 (1968) ("the hard facts are that in many localities, probably including all urban centers, the whole administration of justice would grind to a halt were not most cases disposed of on a plea of guilty").

jority of plea bargains—justify the practice? From the time of its initial affirmative answer in 1968, the ABA has done an about-face on this issue. In its recently revised standards, the administrative efficiency rationale has been deleted. In rejecting this rationale for plea bargaining, the commentary notes, "The solution for crowded criminal dockets is the availability of sufficient personnel and other resources, so that prompt trials can be readily given to all defendants who want them."[176] The commentary, however, supplies no support for the conclusion that abolition of plea bargaining and increased allocation of resources is the uniquely appropriate or optimally desirable solution to the problem.

One justification for that conclusion is supplied by a mechanical application of the due process rule that mere administrative efficiency does not justify infringement of fundamental rights.[177] The scope of that rule, however, has been substantially restricted by recent decisions.[178] Furthermore, the dichotomy between "administrative efficiency" and more compelling state goals is, at least in this context, highly artificial. It is unrealistic to equate the costs of the institutional inquiries mandated by "irrebuttable presumption" and related procedural due process cases with the tremendous cost in financial and human resources of impaneling a jury pool, selecting a jury and alternates, and providing a courtroom, trial judge, public defender, court reporters, bailiffs, clerks, witnesses, and so on. The costs of full-blown criminal trials are not mere administrative costs. In times of scarce financial resources to fund schools, health care, and social welfare programs for the elderly and handicapped, dollars set aside for criminal trials represent funds unavailable for other compelling needs.

A more forceful argument against plea bargaining is its impact on the efficacy of the sentencing policies established by legislatures and courts. Consider the situation in which a basically rational sentencing scheme has been devised by a legislature and followed by courts. In such a system, some defendants have freed scarce resources by pleading guilty in return for leniency—they have received a lesser sentence than would optimize the deterrent and incapacitative goals of pun-

176. *Id.* at 17.

177. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 646-47 (1974); Stanley v. Illinois, 405 U.S. 645, 656-57 (1972).

178. *See* Dixon v. Love, 431 U.S. 105, 113-15 (1977); Mathews v. Eldridge, 424 U.S. 319, 343-49 (1976).

ishment. By hypothesis, these individuals will be incarcerated for a shorter period than was both fair and necessary to protect society from their criminal proclivities. Other defendants who have pleaded guilty will serve the sentence that optimizes those goals—that is, the sentence that is the proper function of utility and desert. If those sentences are less than would have been imposed after trial, however, some defendants who choose trial will be sentenced to periods longer than they deserve. In other words, to maintain the "credibility" of the bargaining system, trial judges must sentence some defendants who choose trial significantly more harshly than is fair or appropriate, in order to coerce the majority of defendants to forgo trial in return for sentences no less severe than fair and useful, but significantly less than imposed after jury conviction. Although the increased punishment in the enhancement cases may be justified on a utilitarian cost-benefit analysis because of increased administrative efficiency, it is nonetheless a morally reprehensible practice under the ethical system adopted earlier.[179]

Administrative efficiency may thus be served within morally permissible limits, if at all, only at the cost of decreased deterrence and incapacitation, and increased crime. Although it is empirically impossible to demonstrate that the cost of improving the criminal justice system so that it can function without plea bargaining is less than the social cost of such crime, it is important to note that the social loss occasioned by criminal conduct is immensely greater than the mere out-of-pocket expenses. A victim's sense of abuse, helplessness, and outrage at the deprivation of property or personal well-being by a criminal is far greater than that which results from ordinary casualty losses or natural illness.

From a moral perspective, then, the ABA is correct in its belief that enhancement of sentences for those who go to trial (as opposed to leniency afforded those who forgo trial) is unacceptable. Furthermore, when sentencing leniency in return for guilty pleas is sufficiently great to undermine the deterrent and incapacitative goals of the criminal sanction, administrative desirability may not be sufficiently compelling to warrant the practice. But between the upper limit of the maximum deserved penalty, and the lower limit of the sentence that so disserves incapacitation and deterrence that it is not justified by

179. *See* pp. 694-98 *supra.*

administrative necessity, there is some moral "room" for differential sentencing.

The least complex illustration is furnished by cases in which the nature of the offender and the offense is such that neither incapacitation nor specific deterrence are required. Typically, this will be true in white-collar crimes, when the convicted defendant poses no future threat to society and the only legitimate end of incarceration is thus general deterrence.[180] Suppose that in such a case, the maximum deserved penalty is two years' imprisonment. A sentencing concession of, for example, six months in return for a guilty plea will save the state substantial financial resources, the value of which may outweigh the decreased deterrence of a 1.5-year as compared to a 2-year sentence.[181]

Even in the more complex situations in which incapacitation and specific deterrence are required, the decreased incapacitation and deterrence created by slightly shorter sentences may be outweighed by the benefits of negotiated pleas. It is unlikely, however, that the substantial differentials now offered in large urban areas can be justified on such grounds. Releasing dangerous felons substantially sooner than is required by considerations of proportionality does not serve the long-term interests of society. At a minimum, it is appropriate to place on the proponents of the current plea-bargaining system the burden of demonstrating that such substantial differentials do in fact produce the maximum overall good.

Whether differentials sufficiently small to satisfy the requirements delineated above offer adequate incentives to any significant number of defendants to forgo the slight but real chance of acquittal at trial is problematical. It is possible to conclude only that, if such concessions expedite criminal justice, they are otherwise morally acceptable. If greater differentials are required as a practical matter to grease the cogs of the system, the use of plea bargaining as a tool of criminal justice

180. *See* note 169 *supra*.

181. That decreased deterrence may be relatively slight or nonexistent. The discussion has posited the existence of a uniquely useful sentence. It may well be true, however, that any of a range of sentences, all within the upper limit of fairness, will serve the purpose of general deterrence equally well. For example, while consistently imposed sentences of five years for a particular type of crime may significantly increase deterrence over sentences of probation or one year, an increase in punishment from 18 months to 20 months or even to two years may not. Such differences may, as a practical matter, have no incremental psychological impact on potential criminals. Courts may, then, offer such leniency in return for pleas that increase administrative efficiency.

administration must be scrapped as either unfair or, in the long run, more harmful than helpful to total societal interests.[182]

VI. JUSTIFICATIONS FOR COERCED COOPERATION

Although prosecutors would undoubtedly prefer to present cases against defendants on the testimony of religious leaders and others whose credibility is not open to serious challenge, many offenses are of such a nature that the only witnesses with compelling knowledge of incriminating facts are accomplices in the specific crime, or at least general criminal associates of the defendant.[183] One method of compelling such testimony is to grant prosecutorial immunity to the witness for his part in the crime to which he will testify, or other crimes in which such testimony might indirectly implicate him.[184] Having offered such immunity, the prosecutor may then call the witness before a grand jury and, under threat of penalty for contempt upon failure to cooperate,[185] or for perjury upon making false assertions,[186] extract the desired cooperation. Alternatively, the witness may be subpoenaed at trial, with the same sanctions operating to coerce truthful testimony.

Prosecutors, however, will prefer to gain cooperation without granting immunity when the witness' criminal activity, whether or not more serious than that of others whose prosecution is sought, is itself too serious to go totally unpunished. In such a case, the prosecutor may induce the witness' cooperation in return for recommendation of a lenient sentence rather than total immunity. Prosecutors also prefer the use of sentencing inducements to contempt or perjury proceedings, which require the full-blown protections of a separate criminal trial. The less rigorous protections afforded the defendant during the postconviction sentencing process permit the prosecution to influence the ultimate disposition of the defendant's case without nearly as great an expenditure of prosecutorial resources. Furthermore, the sentencing power may be used to

182. *See* NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON COURTS § 3.1, at 46-49 (1973) (recommending the eventual abolition of all forms of plea bargaining).

183. This is particularly true in prosecutions of high-level drug dealers and organized crime figures—prosecutions in which incriminating evidence may be available only from others lower down in the criminal hierarchy. *See* notes 28-30 *supra* and accompanying text.

184. *See* Kastigar v. United States, 406 U.S. 441 (1972); 18 U.S.C. §§ 6002, 6003 (1976).

185. *See* 18 U.S.C. § 401 (1976); 28 U.S.C. § 1826 (1976).

186. *See* 18 U.S.C. §§ 1621, 1623 (1976).

aid prosecutors in obtaining the service of defendants as active police agents and informants, a form of cooperation that cannot be directly compelled through contempt or perjury proceedings.[187]

Although there has been little case law or scholarly scrutiny and no explicit examination by the Supreme Court[188] of judicially coerced cooperation other than through the contempt power, there are several objections to the practice, the clearest of which is the potential for self-incrimination by the individual whose cooperation is sought. Fifth amendment rights may be involved in several types of fact situations.

In one, a defendant who has pleaded innocent to particular charges is convicted after trial. Before or at sentencing, the trial judge seeks an acknowledgement of the defendant's guilt, as a sign of repentance and as a signal of the potential for more rapid rehabilitation.[189] Alternatively, the trial court may seek firsthand testimony concerning the role played by others in the crime, not as an aid to their prosecution, but to more accurately determine the relative culpability of the defendant being sentenced.[190] In addition, the court may seek information concerning others for purposes of facilitating their prosecution.[191] Although the defendant in each case already stands convicted of the crime charged, his fifth amendment rights may be affected because of the possibility of a successful appeal. Should a successful appeal transpire, and a retrial occur, the defendant's statements would constitute admissible confessions of guilt in the later proceedings.[192] In addition, a defendant convicted after trial or on a plea of guilty to specific charges may be asked to give information or testify as to acts that might implicate him in other crimes not covered by the plea or conviction.[193]

187. *See generally* Misner & Clough, *supra* note 28.

188. The Supreme Court recently granted a writ of certiorari to consider the practice. *See* Roberts v. United States, 570 F.2d 999 (D.C. Cir.), *aff'd mem.*, 593 F.2d 1372 (D.C. Cir. 1977), *cert. granted*, 100 S. Ct. 42 (1979).

189. *See* United States v. Wright, 533 F.2d 214, 216 (5th Cir. 1976); Poteet v. Fauver, 517 F.2d 393, 394-95 (3d Cir. 1975); United States v. Rodriguez, 498 F.2d 302, 312-13 (5th Cir. 1974); Scott v. United States, 419 F.2d 264, 266-78 (D.C. Cir. 1969); Thomas v. United States, 368 F.2d 941, 945 (5th Cir. 1966).

190. *See* United States v. Chaidez-Castro, 430 F.2d 766, 770 (7th Cir. 1970).

191. *See* United States v. Rogers, 504 F.2d 1079, 1084-85 (5th Cir. 1975); United States v. Hayward, 471 F.2d 388, 391 (7th Cir. 1972); United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972); United States v. Vermeulen, 436 F.2d 72, 76 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

192. FED. R. EVID. 804(b)(1), (3) (hearsay exceptions for former testimony and statements against interest).

193. *See* Bertrand v. United States, 467 F.2d 901, 901-02 (5th Cir. 1972).

In a second type of fact situation, the defendant may be induced to serve as a police agent or undercover informant. Statements made by informants to police or other officials are not privileged communications and are admissible against the informant as confessions.[194] Although the police themselves may forgo steps to initiate the prosecution of a cooperating arrestee, they are powerless to grant formal prosecutorial immunity.[195] It may be necessary, then, for a defendant-informant, as part of his coerced cooperation, to incriminate himself with respect to crimes for which he has not obtained formal immunity from prosecution. In each case, the refusal to cooperate for fear of self-incrimination may be at the expense of an enhanced sentence or a lost opportunity for leniency.

The legal and moral limits on judicial efforts to coerce each of these forms of cooperation can be expressed in four broad propositions: (1) it is impermissible to enhance a defendant's sentence for noncooperation or failure to confess following conviction when such cooperation or confession might subsequently incriminate the defendant for the crime for which he is to be sentenced, or for other crimes;[196] (2) it is impermissible to enhance sentences for noncooperation, even when self-incrimination is not at issue, except when, and to the extent that, such conduct is indicative of a character trait that, from a penological perspective, warrants greater punishment;[197] (3) a court need not grant leniency to one asserting fifth amendment rights as his reason for noncooperation;[198] (4) the practice of granting leniency in return for possibly self-incriminating cooperation does not constitutionally infringe the rights either of those who cooperate or those who stand mute and do not receive consideration.[199]

A. Enhanced Sentences and the Fifth Amendment

Courts have uniformly condemned enhanced sentences re-

194. *See generally* 8 J. Wigmore, Evidence in Trials at Common Law § 2260, at 374 (rev. ed. J. McNaughton 1961).

195. *See In re* Panham, 6 Ariz. App. 191, 193, 431 P.2d 86, 88 (1967); State v. Crow, 367 S.W.2d 601, 605 (Mo. 1963).

196. *See* Poteet v. Fauver, 517 F.2d 393, 398 (3d Cir. 1975); United States v. Rodriguez, 498 F.2d 302, 312-13 (5th Cir. 1974); United States v. Vermeulen, 436 F.2d 72, 76-77 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).

197. *See* DiGiovanni v. United States, 596 F.2d 74, 75 (2d Cir. 1979); United States v. Ramos, 572 F.2d 360, 361-62 (2d Cir. 1978).

198. *See* United States v. Sweig, 454 F.2d 181 (2d Cir. 1972).

199. *See id.*; United States v. Vermeulen, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

sulting from refusal to waive fifth amendment rights.[200] Although these decisions are defensible on moral grounds,[201] their soundness is called into question by the Supreme Court's decision in *Bordenkircher v. Hayes*.[202] In *Bordenkircher*, Justice Powell argued in dissent that the sentence imposed for failure to plead guilty was inappropriately severe, was justified by none of the traditional goals of punishment, and served only administrative efficiency.[203] The majority nonetheless sustained the sentence. When defendants are coerced by threats to aid in the conviction of other, more dangerous individuals, equally compelling social goals are served. As in *Bordenkircher*, the added increment of sentence is imposed not in retribution or as punishment,[204] but as part of an explicit process of give-and-take between the prosecutor and defendant. Just as the defendant is "free" to take or leave an offer of leniency in return for a guilty plea, he can take or leave a promise of a recommended sentence in return for cooperation in the prosecution of others. In fact, the impact of the latter form of coercion on fifth amendment rights is arguably less objectionable than in plea bargaining, since the cooperation of the defendant *may*, but will not *necessarily*, lead to prosecution and conviction. In plea bargaining, the conviction is itself assured because it is the very result required by the terms of the deal. If under *Bordenkircher* it is permissible, by threatening enhanced punishment, to coerce a defendant, by threat of enhanced punishment, to convict himself on his own plea,[205] why is it not a fortiori permissible to coerce him to merely *risk* conviction?

Nonetheless, it is unlikely that the Supreme Court would condone enhanced sentences that burden the assertion of fifth amendment rights, and the practices are indeed distinguishable. The motivating force behind the decision in *Bordenkircher* was the fear that the entire criminal justice system would grind to a halt if substantial limitations were imposed on the powers of prosecutors to deal for pleas.[206] Although the state may have

200. *See* United States v. Wright, 533 F.2d 214, 216-17 (5th Cir. 1976); United States v. Rogers, 504 F.2d 1079, 1084-85 (5th Cir. 1974); United States v. Rodriguez, 498 F.2d 302, 313 (5th Cir. 1974); Thomas v. United States, 368 F.2d 941, 946 (5th Cir. 1966).

201. *See* text accompanying note 82 *supra*.

202. 434 U.S. 357 (1978).

203. *Id.* at 363.

204. *See* note 148 *supra* and accompanying text.

205. *See* text accompanying notes 153-155 *supra*.

206. *See* 434 U.S. at 361-62.

a significant interest in forcing a particular defendant to cooperate in the prosecution of a codefendant or other criminal, the use of defendants as sources of information is less critical to the overall functioning of the criminal justice system than is the disposition of the great majority of cases by guilty plea. Because the social end served is less compelling, the burden on rights entailed by the practice is unacceptable.

B. Other Limitations on Enhanced Sentences

As a theoretical matter, a defendant's refusal to supply information to the state or testify in court is validly considered in setting the sentence, and may justify a more severe penalty than would otherwise be appropriate.[207] Such enhancement does not amount to punishment for a crime of which the defendant has not been convicted. Rather, it recognizes that courts may take into account any facts that bear on the defendant's character and the appropriate disposition of the case.[208]

In some cases, a defendant's refusal to implicate others may indicate that he hopes, after serving his sentence, to return to the criminal organization he is protecting.[209] One of the

207. *See* United States v. Barnes, 604 F.2d 121, 153-54 (2d Cir. 1979), *petition for cert. pending*, No. 79-261; United States v. Miller, 589 F.2d 1117, 1139 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); United States v. Hendrix, 505 F.2d 1233, 1236 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975); United States v. Hayward, 471 F.2d 388, 390-91 (7th Cir. 1972); United States v. Sweig, 454 F.2d 181, 183-84 (2d Cir. 1972); United States v. Chaidez-Castro, 430 F.2d 766, 770-71 (7th Cir. 1970); United States v. Vermeulen, 436 F.2d 72, 75-77 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

208. The range of information a sentencing judge may consider is very broad. *See* Williams v. New York, 337 U.S. 241, 247 (1949) ("A sentencing judge . . . is not confined to the narrow issue of guilt . . . . Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."). In United States v. Grayson, 438 U.S. 41 (1978), the Supreme Court recently reaffirmed this principle, holding that a defendant may be sentenced more severely because of the trial judge's belief that he perjured himself at trial. Such a sentence, the Court held, was not punishment for the crime of perjury, but recognition that one who has perjured himself is a less likely candidate for early release from prison. *Id.* at 53-55.

Evidence that is not admissible at trial may be considered by sentencing courts, including: (1) convictions subsequently overturned on fourth amendment challenges, United States v. Lee, 540 F.2d 1205, 1210-12 (4th Cir.), *cert. denied*, 429 U.S. 894 (1976); (2) illegally seized evidence, United States v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); (3) hearsay, United States v. Rosner, 485 F.2d 1213, 1230 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); (4) dismissed counts on the original indictment, United States v. Needles, 472 F.2d 652, 655 (2d Cir. 1973); (5) evidence admitted at trial as to counts on which the defendant was acquitted, United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972).

209. It is widely acknowledged that membership in an organized crime family and other ties to professional criminal groups are material facts that do and

collateral benefits sought by prosecutors in coercing cooperation, in addition to the information obtained, is the "neutralization" of the informant; cooperation with the prosecution eliminates subsequent participation in crime more effectively than do most lawfully imposed sentences. Although refusal to cooperate may thus in some cases indicate an unwillingness to turn away from crime and a lack of desire for rehabilitation, most often the explanation for noncooperation is fear of reprisal against self, family, or friends, or a misplaced sense of loyalty to past associates.[210]

When a refusal to cooperate seems to justify additional punishment, the extent of such incremental severity must be strictly limited and proportional to the gravity of the failure to cooperate. In *United States v. Ramos*,[211] for example, the defendant pleaded guilty to possession with intent to distribute heroin. Although upon his arrest Ramos gave information that lead to the indictment of Juan Balaguer, the person for whom he was allegedly transporting the heroin, "he subsequently refused to testify and [was] considered to be generally uncooperative."[212] At the time of sentencing, his counsel told the court that Ramos feared the consequences to his family if he testified against others.[213] Clearly emphasizing in colloquy Ramos' failure to cooperate, the court imposed a sentence of ten years' imprisonment plus a ten-year special parole term.[214] The Court of

should influence a court's sentencing decisions. Criminal associations enhance dangers to society and require a sentence predicated primarily on incapacitation and general deterrence. *See* United States v. Neary, 552 F.2d 1184, 1190-95 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977); 18 U.S.C. § 3575 (1976) (special and dangerous offenders); ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 86 (1968); ALI MODEL PENAL CODE § 7.03(2), at 109 (Tent. Draft 1962). *But see* United States v. Rao, 296 F. Supp. 1145, 1149 (S.D.N.Y. 1969).

Congress has recognized the need for a wide-ranging inquiry about a defendant's criminal associations. The Organized Crime Control Act, for example, provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3577 (1976).

210. *See* DiGiovanni v. United States, 596 F.2d 74, 75 (2d Cir. 1979); United States v. Long, 533 F.2d 505, 508 (9th Cir.), *cert. denied*, 505 U.S. 829 (1976); United States v. Skeens, 449 F.2d 1066, 1068 (D.C. Cir. 1971); United States v. Fatico, 441 F. Supp. 1285, 1288-89 (E.D.N.Y. 1977), *rev'd on other grounds*, 579 F.2d 707 (2d Cir. 1978); *Hearings Before the Senate Subcomm. on Administrative Practice and Procedure of the Comm. of the Judiciary on Invasions of Privacy*, 89th Cong., 1st Sess., pt. 3, at 1158 (1965).

211. 572 F.2d 360 (2d Cir. 1978).

212. *Id.* at 361.

213. *Id.*

214. *Id.*

Appeals for the Second Circuit vacated the sentence and remanded for resentencing by a different judge.[215] The excessive severity of the sentence in light of Ramos' culpability, not only for his underlying offense, but for his failure to cooperate more fully with the prosecution, is evidenced by the disposition of the case on remand. Ramos was resentenced under provisions of the Federal Youth Corrections Act,[216] which provides for no required minimum period of incarceration and a maximum period of imprisonment of four years before conditional release.[217]

The disproportionality of Ramos' original sentence and the justifiable limits of enhancement to serve coercive purposes are also suggested by an examination of the civil and criminal contempt alternatives open to the government to obtain cooperation. If the prosecution chooses to grant an otherwise uncooperative witness prosecutorial immunity and then institutes *civil* contempt proceedings for further refusal to testify, the maximum penalty is limited to the life of the court proceeding or the term of the grand jury, including extensions, and may not in any event exceed eighteen months.[218] Although there is no federal statutory limit on the maximum sentence that may be imposed after *criminal* contempt proceedings to punish recalcitrance,[219] the Supreme Court has made it clear that the absence of an express limitation does not render every possible sentence permissible.[220]

Appropriate limits on the exercise of the power to punish for criminal contempt are set forth in *United States v. Leyva*.[221] In that case the defendant, convicted in state court for the sale of heroin and sentenced to serve two concurrent twelve-year terms, was called before a federal grand jury and questioned regarding the source of the heroin he had sold. In spite of a

215. *Id.* at 362. The court noted that Ramos had been only a transporter (or "mule") of the heroin, that he had given the name of the person for whom he was acting, and that there was no indication that his testimony was essential for the successful prosecution of that individual. *Id.* at 361.

216. 18 U.S.C. § 5005-5026 (1976).

217. *Id.* § 5017(a), (c).

218. *See* 28 U.S.C. § 1826(a) (1976); *cf.* Shillitani v. United States, 384 U.S. 364, 371 (1966) (persons imprisoned for criminal contempt because of refusal to answer questions before grand jury may not be held beyond cessation of grand jury proceedings).

219. *See* 18 U.S.C. § 401 (1976).

220. *See* Green v. United States, 356 U.S. 165, 188 (1958) ("The 'discretion' to punish vested in the District Courts by § 401 is not an unbridled discretion."). *See also* Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966); United States v. Leyva, 513 F.2d 774, 779 (5th Cir. 1975).

221. 513 F.2d 774 (5th Cir. 1975).

grant of immunity, he refused to testify, and was subsequently tried for criminal contempt, convicted, and sentenced to thirty-five years' imprisonment, to run concurrently with the twelve-year state sentences imposed. The Fifth Circuit Court of Appeals held that sentence to be excessive.[222] In light of Leyva's relative culpability and the sentences that might have been imposed for civil contempt, perjury, or obstruction, the court reduced his sentence to two years, to be served subsequent to the state sentences. In a similar, later case involving failure to testify before a grand jury because, in part, of fear of reprisal, the Fifth Circuit reduced an initial sentence for criminal contempt from fifteen to two years.[223] A three-year sentence for criminal contempt was upheld by the United States Supreme Court only because "the contempt [was] by any standards a most egregious one" and was well within the sentence authorized by Congress for the underlying conduct constituting the contempt.[224]

It appears, then, that the appropriate severity of enhanced sentences for failure to cooperate should not, in fairness, substantially exceed the authorized penalties for statutorily defined offenses covering the same recalcitrance. In addition to considerations of fairness, limitations of enhancement to periods on the order of one or two years may be dictated by practical considerations. As Judge Lumbard noted in *Ramos*, excessive penalties for noncooperation may significantly deter guilty pleas:

> Had Ramos stood mute and insisted on his right to be tried, instead of pleading guilty, he would have been no worse off upon conviction. Indeed, from our knowledge of dispositions in such cases, he would undoubtedly have been much better off, as a ten year sentence, with ten year special parole to follow, is unheard of in cases such as Ramos'. It follows that if Ramos' ten year sentence after a plea were permitted to stand, no one would plead guilty before Judge Platt or any judge who employed similar tactics to encourage cooperation with the government. Thus, many defendants, apprehensive about sentences on pleas of guilty, would choose to stand trial. Such a trend would lead to the trial of more criminal cases and would seriously threaten the ability of the district courts to try many of their criminal cases within the time limits required by the Speedy Trial Act of 1974.[225]

Although enhancement of penalty for failure to testify may thus be justifiable within these ethically and pragmatically dictated limits, it is totally indefensible to use similar incentives to

222. *Id.* at 780.
223. United States v. Gomez, 553 F.2d 958, 959 (5th Cir. 1977).
224. Green v. United States, 356 U.S. 165, 188-89 (1958).
225. 572 F.2d at 363 (Lumbard, J., concurring) (citing 18 U.S.C. §§ 3161-3174).

compel defendants to undertake active undercover work. Unlike punishment for failure to testify before grand or petit juries, the law does not recognize an affirmative right of the state to demand, under threat of penalty, service as an undercover informant. To create such a duty by exercise of the threat of imposing increased penalties goes beyond the bounds of the appropriate use of the sentencing power. Nor can it be convincingly argued that failure to serve as an informant and to risk death or serious bodily injury is in any way indicative of a character trait warranting enhanced punishment. The proportionate punishment for the underlying offense, determined without consideration of the refusal to perform informant services, is therefore the absolute upper limit on the penalty that may be imposed.

C. Acceptability of Sentencing Concessions

Sentencing concessions made in return for cooperation are both fair and useful.[226] The defendant who cooperates receives a bargained-for benefit. The defendant who refuses to cooperate and receives no leniency cannot justifiably complain, since the sentence he receives is no more severe than that warranted by his conduct.

It has been argued, however, that a defendant whose refusal to cooperate is based on fears of self-incrimination pays an impermissible price—a missed opportunity for leniency—for assertion of his fifth amendment rights.[227] Such an argument, however, leads to absurd conclusions; if valid, it would be necessary either to terminate the practice of granting concessions to any defendant, however willing he is to cooperate, or, assuming that such leniency in some cases is desirable, to grant the

226. *See* United States v. Barnes, 604 F.2d 121, 153-54 (2d Cir. 1979) (cooperation must be considered with all other factors); United States v. Sweig, 454 F.2d 181, 183-84 (2d Cir. 1972) ("cooperation with law enforcement officials would be entitled to consideration"; *id.* at 184); United States v. Vermeulen, 436 F.2d 72, 76-77 (2d Cir. 1970) (defendant who had refused to cooperate was sentenced "to the maximum total term, with the caveat that future cooperation could have a favorable impact before the federal parole board"; *id.* at 77), *cert. denied*, 402 U.S. 911 (1971).

227. *See* United States v. Garcia, 544 F.2d 681 (3d Cir. 1976).

> The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be the objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectation of maximum consideration at the bar of justice: they had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentences to stand.

Id. at 685.

same concessions to every defendant who refuses to cooperate on fifth amendment grounds!

Courts could, of course, place prosecutors in a dilemma by requiring them either to grant immunity to every defendant whose cooperation is sought or to have otherwise rational sentencing schemes undermined by concessions granted to all defendants. Does the requirement of equal protection require that the state forgo all possibility of punishing a defendant in order to obtain cooperation that may protect society from others? When the failure of the state to grant leniency serves a desirable and compelling end—the apprehension and conviction of criminals—that practice violates neither due process nor equal protection guarantees, regardless of whether refusal to cooperate is characterized as forgoing a benefit or suffering a burden.

VII. COERCIVE PRACTICES AND "PRESUMPTIVE" SENTENCING

The coercive practices thus far evaluated developed against a background of broad judicial discretion to set sentences within an often extreme range of legislatively permissible dispositions. The lack of statutory guidance for the sentencing judge on the appropriateness of a particular sentence has resulted in unequal, unfair, and irrational treatment of convicted criminals. This aspect of criminal punishment has been the subject of increasingly severe criticism both from within and without the legal realm,[228] and has engendered a substantial number of proposals designed to ensure uniform and principled sentencing practices.[229] The single most significant legislative response to the problem, in terms of potentially widespread impact, is contained in the proposed revision of the Federal Criminal Code.[230] While a detailed evaluation of that and other similar state statutory provisions is beyond the scope of this Article, it is appropriate to consider briefly the implications of this type of reform for coercive sentencing.

228. *See* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 124-25 (1971); M. FRANKEL, *supra* note 19, at 86-102; A. VON HIRSCH, *supra* note 4, at 98-99.

229. *See generally* PROCEEDINGS OF THE SPECIAL CONFERENCE ON DETERMINATE SENTENCING, DETERMINATE SENTENCING: REFORM OR REGRESSION? (1978); L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION (1978).

230. S. 1437, 95th Cong., 1st Sess. (1977) [hereinafter cited as S. 1437].

The proposed federal reform creates, as an independent organ of the judiciary, a United States Sentencing Commission,[231] whose duties include the formulation of sentencing "guidelines."[232] Those guidelines specify classes of offenses and types of offenders and, for each such offender and offense, a recommended disposition that ranges from probation to fine to imprisonment.[233] In cases in which a period of incarceration is indicated, the guidelines must also provide a fairly limited recommended range of sentences, the maximum of which may not exceed the minimum by more than twenty-five percent.[234]

In establishing categories of offenses and offenders, the statutory language does not require the Commission to consider the form of conviction—guilty plea versus conviction after trial—or the defendant's cooperation or lack of cooperation with the prosecutor and police; however, the statute does *permit* such consideration.[235] The Commission is required to issue "general policy statements regarding application of the guidelines or any other aspect of sentencing that . . . would further the purposes" of the Act.[236] Legislative history makes it clear that those policy statements may "address . . . such questions as the appropriateness of sentences outside the guidelines where there exists a particular aggravating or mitigating factor which did not occur sufficiently frequently to be incorporated in the guidelines themselves."[237]

The types of aggravating or mitigating factors explicitly considered in the statute itself and its legislative history are generally limited to those bearing on the defendant's character and the need to adjust the sentence for purposes of general or specific deterrence, incapacitation, or rehabilitation.[238] As previously noted, pleas or other cooperation may reflect such penologically significant aspects of the defendant's character.[239] Furthermore, although frequently they are not penologically significant,[240] consideration of such factors in setting the sentence may serve the traditional end of punishment—the elimination of social harm through effective enforcement of the

231. *Id.*
232. *Id.* § 994.
233. *Id.*
234. *Id.* § 994(b).
235. *Id.* § 994(c).
236. *Id.* § 944(a)(2).
237. S. REP. NO. 605, 95th Cong., 1st Sess., pt. 1, at 1165 (1977).
238. *See id.* at 1167-68.
239. *See* note 169 *supra*; text accompanying notes 168, 207-209 *supra*.
240. *See* text accompanying notes 169, 210 *supra*.

substantive criminal law. While the Commission is not mandated, then, to consider the issues with which this Article has dealt, it has ample authority to do so in its formulation of guidelines and general policy statements aimed at effectuating the broad goals of criminal sentencing.

Although trial courts are required under the proposed statutory scheme to consider both the Commission's guidelines and its policy statements when imposing a sentence, the disposition chosen may be outside the range established by the Commission.[241] In all cases, however, the court must "state . . . the general reasons for its imposition of the particular sentence, and, if the sentence is outside the range [established by the Commission], the reason for the imposition of a sentence outside such range."[242] Courts are not precluded from considering guilty pleas and cooperation by defendants in determining sentences subject to appellate review under the Act.[243]

In formulating guidelines and policy statements, or in choosing an appropriate sentence, the Commission and courts should adhere to the moral limitations derived earlier, offering leniency in return for cooperation within the bounds of utilitarian considerations, and not exceeding the maximum appropriate sentence dictated by retributive proportionality, to penalize recalcitrance and insistence on the exercise of constitutional rights.

VIII. PROCEDURAL REQUIREMENTS

Whether a convicted defendant will be incarcerated and, if so, for what duration, may be determined in significant part by the trial court's evaluation of the offender's potential value as a source of information and his willingness to become an undercover informant. Frequently courts possess little or no firsthand knowledge of any of these factors. Such information comes from prosecutors, police, and probation or presentence studies that, in turn, may report secondhand or thirdhand hearsay, which is frequently gleaned from other informants.[244]

Sentencing is a critical, often the most critical, stage of criminal proceedings.[245] In the great majority of cases disposed

241. S. 1437, *supra* note 230, § 2003 (1977).
242. *Id.* § 2003(b).
243. *See* 18 U.S.C. § 2003(a)(1) (1976).
244. The court may obtain firsthand knowledge concerning the scope of defendant's information through testimony of the defendant or other witnesses at trial, or as part of the required testimony when accepting a guilty plea.
245. *See* Gardner v. Florida, 430 U.S. 349, 358 (1977); Mempa v. Rhay, 389

of by guilty plea, it is the only critical stage for the defendant.[246] Nevertheless, the sentencing process historically has been less subject to due process scrutiny than most other post-conviction stages of the criminal trial process, in which lesser or comparable liberty interests are implicated.[247]

This extreme dichotomy between the procedures required in order to find a person guilty and those required in setting his sentence initially received the imprimatur of the Supreme Court in *Williams v. New York*,[248] in which the Court concluded that "[t]he due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."[249] The Court emphasized that a "sentencing judge . . . is not confined to the narrow issue of guilt."[250] To determine an appropriate sentence, he must possess "the fullest information possible" regarding the defendant's character and background:[251] "[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."[252] The Court de-emphasized considerations relating to

U.S. 128, 134 (1967); United States v. Pinkney, 551 F.2d 1241, 1249 (D.C. Cir. 1976); 8A MOORE'S FEDERAL PRACTICE ¶ 32.04(1), at 32-59 (rev. ed. 1979).

246. *See* 8A MOORE'S FEDERAL PRACTICE ¶ 32.04(1), at 32-50 (rev. ed. 1979). *See generally* Note, *I Swear That I'm Guilty, So Help Me God: The Oath in Rule 11 Proceedings*, 46 FORDHAM L. REV. 1242, 1243 n.14 (1978); Note, *Rule 11 and Collateral Attack on Guilty Pleas*, 86 YALE L.J. 1395, 1395 n.1 (1977).

247. We continue to "weave the most elaborate procedures to safeguard the rights of those who stand trial, but then treat as a casual anticlimax the perfunctory process of deciding whether, and for how long, the defendant will be locked away or otherwise 'treated.'" M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER vii (1972). *See* Coffee, *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. 1361 (1975); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968). *See also* Smith v. United States, 223 F.2d 750 (5th Cir. 1955).

> The lack of constitutional and evidentiary safeguards thrown around a convicted offender is in striking contrast to those surrounding him before he is found guilty. . . . Yet every lawyer engaged in defending criminal cases knows that often a finding of guilt is a foregone conclusion, and that the real issue centers about the severity of the punishment.

Id. at 754 (citations omitted).

248. 337 U.S. 241 (1949).

249. *Id.* at 251.

250. *Id.*

251. *Id.* at 247.

252. *Id.* Codifications of evidence rules frequently include express provisions excluding their applicability to sentencing proceedings. The Federal Rules of Evidence, for example, provide:

the accuracy and reliability of the information supplied to a sentencing judge and consequently concluded that cross-examination was not critical at this stage of the criminal process.[253]

Recently, there has been a clear drift away from the absolute no-due-process-at-sentence position some have read into *Williams*.[254] The American Bar Association, for example, has recognized the dangers inherent in the abandonment of due process protection in sentencing procedures: "Where the need for further evidence has not been eliminated by a presentence conference, evidence offered by the parties on the sentencing issue should be presented in open court with full rights of confrontation, cross-examination and representation by counsel."[255] In its most recent discussion of the subject in *Gardner v. Florida*,[256] the Supreme Court agreed with the ABA's viewpoint. Although the Court limited its holding to capital sentencing procedures, it acknowledged that "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."[257] Although the "qualitative difference between the death penalty and other punishments calls for a greater degree of reliability when the death sentence is imposed,"[258] *Williams* should not, as Judge Friendly has noted, be overread to "mean that the due process clause [has] no application to mere sentencing."[259] Reliabil-

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Rules inapplicable. The *rules* (other than with respect to privileges) *do not apply* in the following situations:

. . . .

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; *sentencing*, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

FED. R. EVID. 1101(d) (emphasis added).

Judicially or legislatively formulated rules of evidence cannot, however, eliminate constitutional requirements of fairness. The Advisory Committee's Note to Rule 1101(d) states that "the rule is not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing." 56 F.R.D. 183, 351 (1972). *See* United States v. Fatico, 441 F. Supp. 1285, 1289 (E.D.N.Y. 1977). The 1975 amendments to the Federal Rules of Criminal Procedure reflect an increasing awareness of the importance of reliable information as a predicate for proper sentencing.

253. 337 U.S. at 250.

254. *See, e.g.*, Note, *supra* note 247, at 827-28.

255. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 5.4(b), at 254 (1968).

256. 430 U.S. 349 (1977).

257. *Id.* at 358.

258. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

259. Hollis v. Smith, 571 F.2d 685, 693 (2d Cir. 1978).

ity,[260] though literally of vital importance in capital cases, is significant in all sentencings.[261]

If, then, the due process clause is applicable to sentencing procedures, what are its minimum requirements? That question was recently raised and exhaustively analyzed in *United States v. Fatico*,[262] a compelling and well-reasoned opinion by Judge Jack B. Weinstein, based on facts closely analogous to coercive sentencing situations. *Fatico* involved two brothers indicted in connection with a series of armed hijackings of trucks from New York's Kennedy Airport. The defendants were initially charged with conspiracy to receive, and with receiving, stolen goods from interstate commerce, but they ultimately entered guilty pleas to a conspiracy count in satisfaction of all charges then pending. Prior to sentencing, the defendants objected to suggestions in the presentence re-

260. Prior to 1966, the practice was not to reveal presentence reports to the defendant or counsel. In 1966, disclosure was made permissive, and in 1975, it became mandatory. *See* FED. R. CRIM. P. 32(c)(3)(A); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 524, at 394 (1969 & Supp. 1978).

It is significant that Congress, expressing national policy by legislation, added a final sentence to the Supreme Court's proposed draft of Rule 32(c)(3)(A). The addition provides that, at the discretion of the court, the defendant is to be afforded the opportunity to introduce testimony or other information relating to "any factual inaccuracy contained in the presentence report." For a summary of the legislative history, see 8A MOORE'S FEDERAL PRACTICE ¶ 32.03[4], at 32-48 to -49 (rev. ed. 1979); *id.* ¶ 32.0[5][b], at 32-14 to -15. The Advisory Committee to the Supreme Court stated that the purpose of mandatory disclosure was to ensure factual accuracy. *Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts*, 62 F.R.D. 271, 325 (1974). In explaining the rights of a defendant to contest the accuracy of the Government's contentions, the House Judiciary Committee wrote:

> The Committee added language to subdivision (c)(3)(A) that permits a defendant to offer testimony or information to rebut alleged factual inaccuracies in the presentence report. Since the presentence report is to be used by the court in imposing sentence and since *the consequence of any significant inaccuracy can be very serious to the defendant*, the Committee believes that *it is essential that the presentence report be completely accurate in every material respect.* The Committee's addition to subdivision (c)(3)(A) will help insure the accuracy of the present report.

H.R. REP. NO. 247, 94th Cong., 1st Sess. 8 (1975) (emphasis added).

261. It is relevant that in *Gardner* the Court relied upon due process rather than eighth amendment analysis:

> Instead of relying upon the reasoning of the eighth amendment as other capital cases had, a plurality used due process analysis to invalidate nondisclosure of a presentence report . . . . The due process reasoning and its concomitant balancing test allow a defendant facing a potential prison sentence or a fine to advance liberty or property interests sufficient to require procedural protections.

Note, Gardner v. Florida: *The Application of Due Process to Sentencing Procedures*, 63 VA. L. REV. 1281, 1297 (1977) (footnote omitted).

262. 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd on other grounds*, 579 F.2d 707 (2d Cir. 1978).

ports identifying them as members of the Gambino organized crime family and as important figures in the upper echelon of organized crime. At a sentencing hearing, the government offered to support its allegations with testimony by an FBI agent who was the former head of the FBI's Organized Crime Unit in the New York office. This proffered testimony was based on information furnished to the agent by an alleged member of the Gambino family. The government objected to the defendant's proposed cross-examination of the agent about matters that might lead to the disclosure of the confidential source, contending that revelation of the informer's identity would jeopardize his life and compromise his position as a valuable informant.[263]

Although acknowledging that "[m]embership in an organized crime family and other ties to professional criminal groups are material facts that would and should influence the court's sentencing decision,"[264] the trial judge concluded that introduction of the FBI agent's testimony would violate both the defendant's fifth amendment right of due process and his sixth amendment right of confrontation. Although that conclusion was, on the particular facts of the case, subsequently reversed by the Court of Appeals for the Second Circuit,[265] the soundness of the district court's general reasoning remains unquestioned.

The district court first noted that although the right to confront and cross-examine adverse witnesses is "one of the 'minimum requirements of due process' "[266] necessarily afforded at trial, it is not invariably available to defendants at postconviction stages of the criminal process.[267] The court also noted that while the Supreme Court has extended this due process right to parole revocation and probation revocation hearings,[268] it has refused to apply the requirement to prison disciplinary proceedings.[269] Generally, the right is available if a substantial liberty interest is at stake in the proceeding:

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of

263. *See* 441 F. Supp. at 1288.
264. *Id.*
265. United States v. Fatico, 579 F.2d 707 (2d Cir. 1978).
266. 441 F. Supp. at 1292 (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)).
267. 441 F. Supp. at 1292.
268. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).
269. *See* Wolff v. McDonnell, 418 U.S. 539 (1974).

the "liberty or property" language of the fourteenth amendment.[270]

The District Court in *Fatico* found,

> The sentencing process is more like parole and probation revocation hearings than it is like prison disciplinary proceedings. Loss of present liberty is at stake. A courtroom setting makes it relatively simple to afford minimum due process. Like the parolee, the convicted defendant about to be sentenced has at stake a liberty interest; its "termination inflicts a grievous loss."[271]

The court's conclusion that the state should produce for cross-examination those witnesses whose assertions are offered to establish facts material to the sentencing decision was also grounded in the confrontation clause of the sixth amendment.[272]

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270. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (citations omitted). Thus, although parole and probation revocation are not stages of a criminal prosecution, both "result in a loss of liberty." Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973). "[M]inimum requirements of due process" are thus warranted, including "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." Morrissey v. Brewer, 408 U.S. at 489.

In contrast, the Court has held that a prison inmate's loss of good time credits is qualitatively different from the revocation of parole for a parolee. "Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him." Wolff v. McDonnell, 418 U.S. 539, 560 (1974). The loss of good time, on the other hand, "very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored." *Id.* at 561.

271. United States v. Fatico, 441 F. Supp. 1285, 1293 (E.D.N.Y. 1977), *rev'd on other grounds*, 579 F.2d 707 (2d Cir. 1978) (quoting Morrissey v. Brewer, 408 U.S. 471, 482 (1972)).

272. The history of the confrontation clause and the development of the case law interpreting the clause suggest at least the following requirements:

> [T]he government cannot affirmatively prevent the defendant from examining under oath a declarant when the declarant's knowledge is offered by the government (1) at a critical stage of the criminal process, (2) as to crucial information that (3) directly affects a substantial liberty interest of the defendant. To deny defendant access to an informant whose declarations are introduced as evidence is to affirmatively prevent the defendant from examining him. This requirement does not unduly burden the sentencing or other critical criminal processes, but it does afford the defendant his constitutionally mandated protection of confrontation.

Id. at 1297. *See generally* Natali, Green, Dutton & Chambers, *Three Cases in Search of a Theory*, 7 RUT.-CAM. L.J. 43 (1975); Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32 (1973); Note, *Hearsay and Confrontation*, 32 WASH. & LEE L. REV. 243 (1975); Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966).

A declarant's statements concerning the defendant's possession of information useful to the state in the prosecution of crime and concerning the extent and success of the defendant's efforts to cooperate satisfy these requirements when offered at a sentencing hearing. Sentencing is a critical stage of the criminal process; the information is crucial and directly affects the substantial liberty interests of the defendant.

The trial court's conclusion in *Fatico* was subsequently limited on appeal by the Second Circuit's holding that neither the due process clause nor the confrontation clause "prevents the use in sentencing of out-of-court declarations by an unidentified informant where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means."[273] When either of these two conditions is unsatisfied, however, a defendant must have the opportunity to cross-examine witnesses whose assertions form, in whole or in part, the basis for either leniency or enhancement of sentence for coercive purposes.

In addition to this requirement, the district court in *Fatico* identified six "governing principles"[274] of federal constitutional law applicable to the coercive sentencing process. First, although sentencing judges must be permitted to consider at least some hearsay information, it does not follow on either constitutional or nonconstitutional grounds that sentencing judges must be permitted to consider *all* hearsay information.[275] Second, "[m]isinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."[276] Third, "[c]ourts have not limited their focus to cases in which there was proven reliance on demonstrably false information . . . Rather, with increasing frequency, relief has been provided when the sentencing process created a *significant possibility* that misinformation infected the decision, and prophylactic measures have been developed to guard against that possibility."[277] Fourth, once a defendant effectively demonstrates reasonable doubt of the truth of material information, even if he cannot demonstrably show such information to be false, it is impermissible to place the burden of refutation on him.[278] Fifth, "in some circumstances the probation office or prosecution should be requested to provide substantiation of

273. United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978) (footnote omitted).

274. United States v. Fatico, 441 F. Supp. 1285, 1293-94 (E.D.N.Y. 1977), *rev'd on other grounds*, 579 F.2d 707 (2d Cir. 1978).

275. *See* 441 F. Supp. at 1293 (quoting United States v. Bass, 535 F.2d 110, 120 (D.C. Cir. 1976)).

276. 441 F. Supp. at 1293 (quoting United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970)). *See also* United States v. Needles, 472 F.2d 652, 657 (2d Cir. 1973).

277. 441 F. Supp. at 1293-94 (quoting United States v. Bass, 535 F.2d 110, 118 (D.C. Cir. 1976)) (emphasis in *Fatico*).

278. 441 F. Supp. at 1294 (citing United States v. Bass, 535 F.2d 110, 120 (D.C.

challenged information submitted to the judge."[279] Finally, decisions about appropriate procedures to ensure reliable information are largely left to the discretion of the sentencing judge.[280] Although the court emphasized that "rigid adherence to hearsay and other rules of evidence at a sentencing hearing is not essential," and that many matters may be established in an informal way, a sentencing judge must exercise "sound judicial sense for what is essential to protect a defendant against injustice in sentencing."[281]

As a practical matter, the force of the protection afforded a defendant at sentencing by these enumerated requirements is a function of the burden of proof that the state must meet in establishing those facts upon which enhancement of sentence or denial of leniency is to be based. That burden may theoretically be located at any point on the continuum between the "preponderance of the evidence" test of most civil suits to the "beyond a reasonable doubt" test for establishment of the elements of a criminal offense. After a lengthy analysis of the various burdens of proof required in a host of civil and criminal contexts, and the competing state and individual interests at stake, the trial court in *Fatico* appropriately concluded that the burden on the prosecution to establish facts not proved at trial, but upon which critical liberty rights of the defendant will hinge, is one of "clear unequivocal and convincing evidence."[282]

Cir. 1976); United States v. Perri, 513 F.2d 572, 574 (9th Cir. 1975); United States v. Needles, 472 F.2d 652, 659 (2d Cir. 1973)).

279. 441 F. Supp. at 1294 (quoting United States v. Needles, 472 F.2d 652, 658 (2d Cir. 1973)).

280. 441 F. Supp. at 1294 (citing United States v. Needles, 472 F.2d 652, 658 (2d Cir. 1973)); United States v. Rosner, 485 F.2d 1213, 1230 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974)).

281. 441 F. Supp. at 1295..

282. United States v. Fatico, 458 F. Supp. 388, 409 (E.D.N.Y. 1978). The court relied on the Supreme Court's reasoning in Specht v. Patterson, 386 U.S. 605 (1967), and the Second Circuit's more recent holding in Hollis v. Smith, 571 F.2d 685 (2d Cir. 1978). Specht involved a conviction for taking indecent liberties, under a Colorado statute that specified a ten-year maximum sentence. Another statute, the Sex Offenders Act, allowed the trial court to impose an indeterminate sentence of from one day to life if the court was "of the opinion that [a person convicted of specified sex offenses], if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." 386 U.S. at 607 (quoting COLO. REV. STAT. § 39-19-1). Characterizing the invocation of the Act as "the making of a new charge leading to criminal punishment," 386 U.S. at 610, the Court held that the defendant must be afforded substantial due process: "[The defendant must] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." *Id.*

Hollis, a case similar to *Specht*, involved a New York sex offender law that,

That holding, and its supportive reasoning, apply *mutatis mutandis* to any fact concerning the defendant's cooperation or lack of cooperation upon which the severity of sentence will be based.

In order to ensure that the state proves by clear, unequivocal, and convincing evidence the facts upon which a differential sentence is based, trial courts should, either as a self-initiated practice, or in conformity with rules formulated by appellate courts in their supervisory capacity or by legislative enactment, state on the record their reasons for choosing a particular disposition in any given case. Such a record should include an indication of those facts as to which the court believes the state has met its burden of proof, and the significance that those facts played in determining the sentence imposed.[283] Indication should be given, within fairly narrow limits, of the sentence that would have been imposed were the court not seeking to serve coercive goals, and the degree of leniency that

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unlike the Colorado statute, required no proof of new fact before enhancement of sentence. Rather, it "simply enlarged the court's sentencing discretion without any standards whatever," 571 F.2d at 688, from a maximum of five years to a maximum of life. The statute had been interpreted by the state courts, however, to require a psychiatric study and finding that the defendant was dangerous or capable of benefiting from confinement. In *Hollis*, the Second Circuit, in an opinion by Judge Friendly, determined that due process required proof of the critical fact at issue by "clear, unequivocal, and convincing evidence." *Id.* at 695-96.

283. Compare the statement of the district court judge in *Fatico* at sentencing:

> Defendant has recently been sentenced to three years on a federal gambling charge independent of the instant hijacking case. . . . He is appealing from the conviction and the sentence has been stayed.
>
> Were it not for the organized crime issue, defendant would have been sentenced in the hijacking case to no more than a three year term, concurrent with the gambling sentence. This is in conformity with standard practice favoring concurrency. A three year concurrent sentence would take into account defendant's age, health problems, close and stable family relationships, and the fact that because his prior convictions in the state courts have almost without exception been punished by relatively small fines and probations, this is his first major taste of incarceration. In addition, the maximum penalty is five years and defendant is entitled to some consideration for his plea of guilty.
>
> Based on the evidence presented at the sentence hearing, the court concludes that defendant is a member of the Gambino crime family. It sentences him to a prison term of four years to be served consecutively with the three year sentence for gambling. This new sentence is necessary for purposes of incapacitation to protect the public from further criminal conduct by the defendant, a recidivist and member of a dangerous group of well-organized criminals.

United States v. Fatico, 458 F. Supp. 388, 412-13 (E.D.N.Y. 1978) (citations omitted).

will be afforded for specified future cooperation by the defendant.

A record of the factors that influenced the sentencing decision, and their relative weights, enables a defendant to evaluate the precise cost of continued recalcitrance and the value to be obtained by future cooperation. A "firm offer" is more likely to induce a change of heart in an uncooperative defendant than is mere conjecture about the possibility and extent of leniency to be gained for assisting the prosecution. The fact that the *quid pro quo* is a matter of record protects a defendant who chooses to cooperate from the possibility of subsequent disputes concerning the nature of the services expected of him, and the value of the proferred "reward."

As an almost uniform matter, however, courts have traditionally not been required to state on the record any reason whatsoever for imposition of a sentence that is within statutory bounds.[284] Absence of such a requirement is a corollary of the general rule that appellate courts will not substantively review sentences imposed in conformity with guarantees of procedural due process.[285] But just as the soundness of the latter rule is coming under ever-increasing attack,[286] so too must the justifiability of the former. Although it is beyond the scope of this Article to consider the desirability of specific proposals calling for general appellate review of sentencing, it is clear that such review would serve a number of valuable goals when coercion plays a part in the sentencing court's philosophy.

First, given an adequate record, it will be possible for appellate courts to find as a matter of law that the state did not in fact meet its burden of proof as to facts that the trial court considered critical elements of the sentence determination. Second, it will be possible to determine that a defendant was denied the opportunity to cross-examine a witness whose statements were relied upon by the trial court in setting the sentence, when there was either no compelling reason to refuse to produce the extra-judicial declarant, or insufficient corroborating information concerning the facts asserted. Third, in their supervisory role, appellate courts may indicate that a particular

284. *See* United States v. Rosner, 549 F.2d 259, 264 (2d Cir. 1977), *cert. denied*, 434 U.S. 826 (1977); United States v. Siejo, 537 F.2d 694, 699 (2d Cir. 1976), *cert. denied*, 429 U.S. 1043 (1977).

285. *See* note 19 *supra*.

286. *See generally* ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 39-41 (1968); Richey, *Appellate Review of Sentencing: Recommendation for a Hybrid Approach*, 7 HOFSTRA L. REV. 71 (1978).

differential coercively imposed was inappropriately severe, or that enhancement, rather than leniency, was impermissibly used by the trial court. Excessively severe sentences for coercive purposes would thus be curtailed, abuses of the sentencing power reduced, increased fairness ensured, and development of principled criteria for just and rational sentences fostered.

IX. CONCLUSION

Exercise of the judicial sentencing power to coerce guilty pleas, testimony, or informant services may be consistent with justifiable ethical norms, constitutional requirements, and the proper role of courts in an adversary system. But even as society seeks to protect itself from those who would prey on its members, the exercise of that power must be rigidly circumscribed by considerations of retributive proportionality, on the one hand, and utilitarian effectiveness, on the other, within a procedural context designed with due regard for the fundamental rights of the accused or convicted.